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WISCONSIN REPORTS

141

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

NOVEMBER 12, 1909—FEBRUARY 22, 1910

FREDERIC K. CONOVER
OFFICIAL REPORTER

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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Ex officio CHIEF JUSTICE
ROUJET D. MARSHALL
JOSHUA ERIC DODGE
ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES

Attorney General - - FRANK L. GILBERT

Clerk - - - CLARENCE KELLOGG

The following rule was adopted April 26, 1910:

SUPREME COURT RULE 43*a*.

In divorce actions pending in this court on appeal perfected after July 1, 1910, no allowances for suit money, counsel fees, or disbursements in this court, nor for temporary alimony or maintenance of the wife or children during the pendency of the appeal, will be made in this court.

Such allowances, if made at all, shall be made by the proper trial court upon motion made and decided after the entry of the order or judgment appealed from and prior to the return of the record to this court; *provided*, that if such allowance be ordered before the appeal is taken such order shall be conditioned upon the taking of the appeal and shall be without effect unless and until the appeal be perfected.

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CASES DETERMINED

AT THE

August Term, 1909.

BAYFIELD COUNTY BANK, Respondent, vs. DULUTH LOG COMPANY, imp., Appellant.

October 29—November 12, 1909.

Liens on logs, etc.: Enforcement by assignee: Pleading: Joinder of causes.

1. **A finding by a referee, confirmed by the trial court, that certain time checks were purchased, not paid, by the plaintiff bank, is *held* to be sustained by the evidence.**
2. **Objection to the joinder in one action of claims on several time checks, if not taken by demurrer or answer, is waived.**
3. **Under sec. 3333, Stats. (1898), an assignee of several time checks, though not himself an employee, may enforce all the claims for liens in one action.**

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

This action was brought to enforce a large number of laborers' liens on posts, poles, and other log products, under the provisions of sec. 3329 *et seq.*, Stats. (1898). The plaintiff claimed to have purchased the claims and to be entitled to enforce the same as assignee. The case was tried before a referee, and it was found that the plaintiff bank purchased a large number of time checks, issued by the defendant the Jacobs-McDonnell Company, for work on logs and timber, and that such time checks were assigned by the various labor-

ers to the bank by indorsement; that said checks were purchased by the plaintiff pursuant to an agreement between the plaintiff and the Jacobs-McDonnell Company, by which the plaintiff agreed to purchase the checks and claims at their face and the Jacobs-McDonnell Company agreed to pay interest on them from the time of the purchase until they fell due; and that the plaintiff was entitled to judgment of lien on the posts, poles, and timber described in the complaint, a part of which was in the possession of the defendant the *Duluth Log Company*. The referee's report was confirmed by the court and judgment entered thereon, from which the *Duluth Log Company* appeals.

For the appellant the cause was submitted on the brief of *Archibald McKay*.

A. W. McLeod, for the respondent.

WINSLOW, C. J. A number of errors are assigned, but only two are argued, and these are all we deem it necessary to consider.

It is first contended that the evidence clearly shows that the plaintiff paid the time checks instead of purchasing them. This contention must be overruled. The so-called checks were simply memorandums of the number of days' work done and the balance due therefor, signed by the foreman and payable at the plaintiff bank. They were not directed to any person or corporation as the payor. It is true that the evidence was somewhat vague as to the arrangement under which the bank cashed them, but it was certainly sufficient to justify an inference of fact that the bank agreed to and did purchase them and did not agree or intend to pay them.

It is said that the plaintiff could not join, in one action, claims on a number of time checks. There seem to be two answers to this contention: *First*, the objection was not taken either by demurrer or answer and hence is waived; *second*, sec. 3333, Stats. (1898), expressly gives one employee the

right to take by assignment the claims of others and enforce them all in one action. It then makes such claims generally assignable, and gives the assignee the same rights of enforcement as the assignor. Thus the assignee, who is not himself an employee, is put upon the same footing as an employee with regard to the enforcement of such claims.

By the Court.—Judgment affirmed.

HART, Respondent, vs. CITY OF NEILLSVILLE, Appellant.

October 29—November 12, 1909.

Municipal corporations: Sewerage: Insufficiency: Injury to property: Liability: Notice: Contributory negligence: Burden of proof.

1. If a municipality, without first having duly adopted a plan, constructs and puts in operation an unsuitable sewer system, it is liable to a private property owner for damage caused proximately to his property by the insufficiency without contributory negligence of such owner.
2. If a municipality puts a sewer system in operation, having first duly adopted plans therefor, and the same is insufficient because of failure to exercise ordinary care in executing such plans, it is liable for injuries proximately caused to private property, without concurrence of contributory negligence of the owner thereof.
3. In the circumstances stated in No. 1 and No. 2, the insufficiency being inherent in the plans or original construction, notice to the city from the beginning of the difficulty, sufficient to charge it with liability, is presumed.
4. If a municipality is free from actionable negligence, respecting adoption of plans for its sewer system and constructing and putting the system in operation, but the system proves not to be reasonably suitable, and it fails reasonably to remedy the deficiency within a reasonable time after having received actual, or constructive, notice thereof, it is liable the same as in case of want of ordinary care inhering in the installation of the system.
5. If a property owner knows, actually or constructively, of a deficiency in a municipal sewer system rendering it dangerous to connect his property therewith by a drain with an open end in

his basement, yet he does so, he is guilty of contributory negligence precluding him from recovering for an injury to such property, proximately caused or aided by such circumstance.

6. If a person connects the basement of his dwelling house with a main sewer in front thereof, by a drain, leaving the basement end open, and he thereafter perceives that it is dangerous to his property, he cannot recover damages from the municipality for injury thus caused to such property, which ordinary care on his part, after discovering the danger, would have prevented.

7. If all the conditions exist, rendering a municipality liable to a property owner because of sewage passing from a public main sewer to and into his dwelling-house basement by way of a drain-pipe connection between such main and such basement, unless the inflow is permitted by a defect in the drain for which the property owner is wholly or partially responsible,—the burden of proof is on the defendant to show want of ordinary care of such owner.

8. In the circumstances stated in No. 7, and it appearing that damage was caused by back flow of sewage from the drain, caused by insufficiency of the sewer system, such sewage reaching the basement through a defect in the drain, as apparently attributable to want of ordinary care of the property owner as attributable to actionable insufficiency of the sewer system, the former cannot recover.

9. In an action for damages upon the ground of an injury having been produced by want of ordinary care on the part of the defendant, it is incumbent on the plaintiff to show, by evidence, with reasonable distinctness, how and why the damages occurred.

10. In the circumstances stated in No. 9, if whether the real cause of the injury was a condition negligently created by plaintiff, without which the injury would not have occurred notwithstanding the negligence of the defendant, or was the latter negligence, rests wholly in conjecture, he cannot recover.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Action to recover compensation for injuries, claimed to have been caused plaintiff's residence property by escape of water and sewage into the basement of his dwelling house, by reason of the negligent condition of defendant's sewer system.

The complaint was to this effect, after stating the corporate

existence of the defendant and describing the property in question: Adjoining the basement of plaintiff's dwelling house, there was a well from which he was accustomed to obtain a supply of pure water for domestic purposes. The basement wall, practically, formed one side of the well. The house fronted on Fifth street. The basement was used for a furnace and fuel room and storage place for such domestic supplies as are customarily kept in such places. A part of the sewer system, constructed and maintained by defendant, was located on Fifth street. It was constructed under municipal authority at the expense of abutting property owners; plaintiff paying his due proportion thereof. An opening was left by the municipality in front of plaintiff's property to enable him to connect his premises therewith, and such connection was made with due care under the supervision of defendant's duly authorized officers. The sewer system was unskilfully constructed, in that the portion on Fifth street was too small to accommodate the sewage which was designed to be and was turned into it. The catch-basins were so located as to turn surface water into the sewer, far in excess of its capacity, and the slope toward the outlet was insufficient. It was so constructed, in connection with other portions of the system, that a creek, called Goose creek, in which great quantities of surface water customarily accumulated, flowed into it, so such inflow, that from catch-basins and from private property connections, greatly overtaxed the capacity of the sewer and caused the contents thereof to back up and escape through connecting drains into basements on abutting property, including plaintiff's premises. The city sewage system was so designed and constructed that substantially all the sewage of the city, discharged from the numerous private connections, and all the surface water, including much of that flowing into Goose creek and then into the sewer connected therewith, were obliged to pass to the outlet on the bank of O'Neill creek through a sixteen-inch pipe, which was much too small

to discharge the same with sufficient freedom to prevent backing up. By reason of the facts aforesaid, on and between July 3, 1903, and March 24, 1904, to wit, on said July 3d, and on July 9th, August 4th, September 12th, 13th, and 14th, and March 24th, the connection between plaintiff's basement and the main sewer was filled up and rendered useless, so that large quantities of the contents of the main were discharged into said basement and into the well, filling said basement to a depth of several feet and the well to a like level, rendering the dwelling house untenantable, destroying the well, causing the ground around and a part of the well to cave in, the basement wall to settle and fall in and the building to settle, its walls to crack, and the structure otherwise to be seriously damaged. The sewer was constructed without any plans having been adopted and without any regard to adapting capacity to the work required, with the consequences stated. Prior to the injuries to plaintiff's property, defendant had notice of the dangerous condition of the sewer system, as alleged, and that such condition was remediable by enlarging the outlet into O'Neill creek and closing the inlet from Goose creek. When plaintiff connected his property with the sewer system he did not know of its insufficient character. He thereafter used ordinary care to guard his premises from invasion from the sewer, and such invasion as occurred was without his fault. Because of the wrong complained of, his property has been damaged to the extent of $1,500.

The trial court sustained a demurrer to the complaint for insufficiency. On appeal. the decision was reversed. The case is reported in 125 Wis. 546, 104 N. W. 699.

Such proceedings were duly had, after the reversal aforesaid, that defendant answered, admitting all allegations of the complaint, not fatally affecting the claim for damages, alleging that the sewer system was constructed, in all its parts, according to a plan duly adopted. and putting in issue all allegations as to negligent construction or maintenance or insuf-

ficiency of the system, and alleging that the connection of plaintiff's premises with the system was made by himself without supervision, direction, consent, or interference on the part of the defendant.

The cause was submitted to a jury for a special verdict resulting in the following findings: (1) Defendant adopted a plan for the sewer system before it was constructed. (2) At the time and place in question, it was defective and insufficient. (3) Such condition was the proximate cause of the injuries to plaintiff's property. (4) Defendant had notice of such condition a sufficient length of time before the injuries were caused to enable it by the exercise of ordinary care to have remedied the insufficiency. (5) Defendant was guilty of a want of ordinary care in respect to the construction of the sewer system. (6) Plaintiff's property connection with the sewer system was not insufficient or defective. (7) He exercised ordinary care in constructing and maintaining the connection. (8) Plaintiff was damaged by reason of defendant's negligence $950, as follows: $246 on July 4th and 9th and August 5th, and $704 on September 12, 13, and 14, 1903.

In due course, there was a motion for defendant to change the answers to various questions, which was denied, and also for an order setting aside the verdict and for a new trial on several grounds, which was also denied.

Judgment according to the verdict was rendered for the plaintiff.

For the appellant there was a brief by *Homer C. Clark* and *Geo. L. Jacques,* city attorney, and *L. M. Sturdevant,* of counsel, and oral argument by *Mr. Jacques* and *Mr. Sturdevant.* To the point that plaintiff was guilty of contributory negligence and therefore cannot recover, they cited 28 Cyc. 1338; *O'Brien v. Worcester,* 172 Mass. 348; *Valparaiso v. Ramsey,* 11 Ind. App. 215, 38 N. E. 875; *Guthrie v. Nix* (Okla.) 49 Pac. 917; *German T. School v. Dubuque,* 64 Iowa, 736; *Simpson v. Keokuk,* 34 Iowa, 568; *Hoehl v. Mus-*

catine, 57 Iowa, 444; *Fulleam v. Muscatine,* 57 Iowa, 457; *Cooper v. Dallas,* 83 Tex. 239; *Dallas v. Cooper* (Tex.) 34 S. W. 321; *Green v. Ashland W. Co.* 101 Wis. 258; *Steinhofel v. C., M. & St. P. R. Co.* 92 Wis. 123; *White v. C. & N. W. R. Co.* 102 Wis. 489; *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333; *Wilson v. Waterbury,* 73 Conn. 416; *Mayor, etc. v. Small,* 108 Ga. 309. That he was guilty of such negligence as a matter of law is shown by the following illustrative cases: *Hogan v. Winnebago T. Co.* 121 Wis. 123; *Bremer v. Pleiss,* 121 Wis. 61; *Schrunk v. St. Joseph,* 120 Wis. 223; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331; *Ray v. Stuckey,* 113 Wis. 77; *Walters v. C. & N. W. R. Co.* 113 Wis. 367; *Sheriff v. Oskaloosa,* 120 Iowa, 442; *Buckley v. New Bedford,* 155 Mass. 64, 67.

For the respondent there was a brief by *S. M. Marsh* and *O. W. Schoengarth,* attorneys, and *James Wickham,* of counsel, and oral argument by *Mr. Marsh* and *Mr. Wickham.*

MARSHALL, J. On the former appeal it was held that if, as alleged, appellant failed to duly adopt a plan for its sewer system before constructing the same, or, having so adopted a plan, failed to reasonably construct the system in accordance therewith, it was guilty of actionable negligence and liable to respondent for such damages to his property, as were attributable to such negligence as the proximate cause thereof and were not produced by his own want of ordinary care concurring with appellant's wrong. Further it was held that, if the appellant was free from actionable negligence in respect to the adoption of plans for its sewer system, or execution of the same, yet, in operation, the system proved to be dangerously inadequate for the purpose thereof, and it failed to remedy the deficiency within a reasonable time after actual or constructive notice thereof, it was guilty of actionable negligence, and was liable for any damage to respondent's property, at-

tributable to such negligence as the proximate cause thereof, and not produced by want of ordinary care on respondent's part concurring with that of appellant. Such is the law from an original standpoint, but, in any event, such is the law of this case. *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563; *Darcey v. Farmers' L. Co.* 98 Wis. 573, 74 N. W. 337; *Collins v. Janesville,* 111 Wis. 348, 359, 87 N. W. 241, 1087; *Habenicht v. C., St. P., M. & O. R. Co.* 134 Wis. 268, 114 N. W. 497.

The decision of the jury was in favor of appellant, as to whether plans for the sewer system were adopted, but in favor of respondent, as to whether ordinary care was exercised in constructing the system. It is the opinion of the court that the effect of such findings is that appellant did not follow, reasonably, the adopted plans in constructing the system and putting it in operation. There is ample evidence of that which need not be referred to in detail. Probably the most significant of any is the evidence that the plan did not contemplate connecting the system with Goose creek, which connection may well have been regarded by the jury as an efficient cause of overloading the system, particularly, on that part of the street on which respondent's property was located.

Since the jury found that, although a plan for the sewer system was duly adopted, it was negligently constructed, in that ordinary care was not exercised to execute the plan, it is considered that such want of ordinary care relates to the defective character of the system, which the jury found was the proximate cause of the injury to respondent's property. Therefore, the defect being inherent in the original installation of the system, in that proper regard for the adopted plans was not exercised, notice of the insufficiency which became evident by the operation, necessary to charge it with liability for damages attributable to its negligence as a proximate cause, must be conclusively presumed. The rule applies as in case of imperfect original construction of a highway. Lia-

bility of the municipality for consequences to travelers proximately caused by original insufficiency commences at once, while, if the construction is free from actionable imperfections at the start, and the highway subsequently becomes unsafe, such liability does not commence till the municipality has actual or constructive notice of the defect and reasonable opportunity to remedy the deficiency, or to efficiently guard against injury happening to users in the exercise of ordinary care.

Because of the foregoing, several suggested errors in the admission of evidence, bearing on the question of notice to the appellant of the defective condition of the sewer system, are immaterial. In this connection, we will add that we cannot discover harmful error in any of the complaints as to the reception or rejection of evidence, and with that we will pass the subject, as one not requiring treatment of the numerous incidents in detail, cited to our attention.

The most serious matter is involved in the question of whether the evidence shows conclusively that respondent was guilty of contributory negligence, precluding a recovery as to part, if not the whole, of the damages claimed. On that we will refer, briefly, to the undisputed facts and the inferences unmistakably arising therefrom.

Appellant knew, as well as respondent, the general conditions rendering the sewer insufficient to carry off all the water and sewage liable to flow into it without danger of overloading, causing the contents to back into drains connected with property abutting on the street, and discharge into basements below the standing level of contents of the sewer and its connections,—at the time he made his connection. He knew that the surface drainage from a large territory was into the main on Fifth street by way of street catch-basins and drain connections with the surfaces of lots and roofs. He knew that the sewage from numerous occupied buildings on the street was discharged into the main. He knew that such ac-

cumulations from these and many sources as would necessarily occur, especially during periods of severe rainfall, had no way of reaching the outlet of the sewer system except through the eight-inch main on Fifth street, which served catch-basin connections of the same size and numerous six-inch connections with basements on abutting property. He knew that the drain connections with the main were at the side thereof and that the slope from the basement end of his drain to the top of the main was not much over eighteen inches. He knew, or ought to have known, because he could not have helped it had he paid ordinary attention to the matter, that the slope of the sewer was so slight, the slope from the opening of the basement to the main so little, and the height of water liable to occur in the catch-basin near his property, during rainstorms, such that the high point would, necessarily, at times, be above the basement open end of his drain. He must have known that the end of his drain in the basement was only some four feet below the opening in the nearby catch-basin. It had been well known for over a year before he made his connection with the sewer, that, during rainstorms, basements on defendant's street were liable to be flooded from the sewer, unless the connecting drains were armed with checks to prevent it. It seems respondent must have known this, as one or more of his nearest neighbors had suffered, and remedied the difficulty by a check valve in the drain pipe. He knew that water when permitted to flow will move till it comes to a rest, all points within the zone of restraint being at a common level, and that it will move till it reaches boundaries permitting such common level. In that situation he deliberately connected his drain with the main sewer, leaving the basement end open and below the level to which contents of the sewer system and its connections were, with reasonable certainty, liable to frequently reach, in that the end of the six-inch drain pipe was only closed to the extent of inserting therein a four-inch iron pipe, thus leaving

over half the area of the opening for the free passage of such contents into the basement, upon any occurrence of the main being overloaded so as to cause a substantial standing level in the catch-basins above the open end of the drain.

That he might as well have left the basement end of his drain entirely open, as to leave it as he did, seems plain. How can any one reasonably say to thus leave a drain, under the conditions detailed, is consistent with ordinary care? Could one fairly say, in any case, that it would be consistent with ordinary care to leave open the basement end of a drain pipe leading to a small main sewer, designed to serve the purpose of surface and sanitary drainage for a large territory, such basement end being only four feet below the level of surface openings of nearby catch-basins? This question, it seems, must be answered in the negative.

It is a matter of common knowledge that the connections between conveniences on the main floors of dwellings and other houses and public sewer systems are, universally, supposed to be water-tight, for the purpose, among others, of preventing escape of the contents of the sewer or of the drain connections, at times of temporary overloading of the main, into basements. To leave free openings in such connections below the level which water may reasonably be expected to reach in nearby catch-basins during severe rainstorms, would, it seems, be the height of folly; would be negligence of such high degree as to seemingly invite disaster; a reckless disregard of the operation of natural laws.

In view of the foregoing we cannot escape the conclusion that the answer of the jury, wholly acquitting respondent of contributory negligence, and the answer to the effect that all the injuries complained of were proximately solely caused by appellant's negligence, are not supported, at all, by the evidence, and should have been changed to some extent, if not altogether.

As indicated by the fact that the court submitted the case

to the jury for a finding as to the damages caused to respondent's property on and prior to August 5, 1903, separately from such as were caused on September 12th to September 14th, inclusive, the circumstances of the latter are somewhat different from those respecting the former. At the time water and sewage first appeared in the basement, respondent saw it demonstrated that the open end of his drain pipe was the immediate cause of the mischief. By the undisputed evidence, it was apparent to him, or any one by ordinary inspection, that it was perfectly feasible to prevent a recurrence of the back flow from the main sewer by either discontinuing entirely the drain, or sealing up the basement end around the connection with the iron pipe so as to permit water to rise above such end a short distance into such iron pipe, or by putting in a check valve appliance, used in such cases, to allow a flow of water towards the main sewer but prevent any back flow. He did neither till after August 5, 1903. Then he put in a check valve and made a closed channel from the tile drain up through the iron pipe connection to the points of use on the floor above. That, by the undisputed evidence, would have prevented any further invasions from the main sewer, had there not been an opening in the drain caused by a fracture in a section of tile, just outside the basement wall, through which opening water and sewage escaped from the main, broke through the wall, and did the damages assessed by the jury at $704.

On the branch of the case relating to the $704 aforesaid, does the evidence warrant a conclusion, to a reasonable certainty, that the tile, found to be broken, was, to one in the exercise of ordinary care in laying such a drain as that in question, apparently suitable for use when it was put in place by respondent, and it nevertheless broke under back pressure from the sewer, caused by the negligent construction found by the jury?

There is no direct evidence that the section of tile which

was found broken was perfect, or apparently perfect, when it was put in place. The flange end only was fractured. There is no proof that the disengaged part lay in place, or near by, indicating that the breakage occurred after the drain was completed. The record is silent as to these matters, though respondent, and no one else, could have made proof on the subject. For aught that appears, the tile when put in place had a broken flange end. Was it not incumbent on respondent to give some explanation of the cause of the defect, showing affirmatively that the tile was in good condition when laid and was afterwards broken? True, the presumption, in absence of any evidence to the contrary, would be in favor of the drain having been free from defects when laid, and the burden of proof be on appellant to establish contributory negligence. But when respondent made proof that the drain tile was, in fact, defective, and that such condition permitted the sewage to escape into the basement, and that he, himself, laid the drain, and there were persuasive indications that the tile was imperfect from the beginning, was not the burden then cast upon him to rebut that situation, at least to the extent of showing that the piece broken out of the tile was in place or near by as if separated by some inward force?

As the case went to the jury, there was no definite evidence as to how the tile may probably have been broken after being laid. True, there was proof that the action of water, under some circumstances, produces peculiar, and sometimes unlooked for and not easily explainable, results; but no satisfactory proof was given that the pressure of water caused by a head of five feet—which from the evidence is the ultimate that could have been produced, since the location of the broken tile was about that distance below the point of relief at the street opening of a nearby catch-basin—could cause any such consequences as the breaking of an ordinary six-inch tile at the flange. The flange, if the tile were properly laid, was wholly outside the one inserted into it, so the pressure of water

from within the drain was communicated to the flange only by pressure against the in-surface of the nonelastic pipe which it encircled. Does not that indicate that the flange was broken before the tile was laid, at least so as to call for some explanation from respondent? Under the circumstances, was there more than room for conjecture that the back water from the sewer caused the fracture? If it was as reasonable to conclude that the tile was imperfect when laid as that it was fractured thereafter, then there was no jury question on the evidence. Surely if respondent was so reckless as to place a broken tile in the drain pipe, obviously, he must take the consequences.

It is an established rule of law that, in a case of this sort, if the circumstances leave the question of whether the negligence of the defendant was the proximate cause of the injury without contributory negligence on the part of the plaintiff, wholly a mere matter of conjecture, there can be no recovery. That is, as applied to the facts here, if the immediate proximate cause of the damage was the broken tile, and it is as reasonable to conclude that the existence of the defect was caused by negligence of the plaintiff, as that it was caused by negligence of the defendant, so that one can only conjecture where the truth lies, it is impossible to reach a conclusion in respect to the matter with that reasonable certainty requisite to a verdict, and, therefore, no jury question was presented.

The principle stated was declared in *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729, with many supporting authorities from this and other courts. It was there said, in a case of this sort, it is incumbent upon the plaintiff to show, by evidence, with reasonable distinctness, how and why the damages occurred. To present two or more states of the case, each equally with the other pointing to the proximate cause of the injury, thus only putting one conjecture against another as regards the real cause of the mischief, comes far short of establishing a cause of action.

It is difficult to reach the conclusion, in the absence of any definite explanation of how the tile came to be in place with the piece broken out of the flange; any affirmative evidence that it was not in that condition when laid; not even that the disengaged piece was in place or around, indicating a recent break, or that it was found at all, in face of the fact that pressure of water in the drain could not well have affected the flange end without first fracturing the end of the pipe, which, so far as appears, was perfect—that back water from the sewer had anything to do in producing the defect. The major probabilities weigh very heavily on the side that plaintiff is responsible therefor, having laid the tile in the defective condition it was found. Certainly, it seems that, respondent was bound to furnish some definite evidence to rebut the inference of his fault arising from the situation described, before charging appellant with responsibility for a result which would not have happened but for the opening in his drain pipe upon his own property, which appellant had nothing to do with and had no right to interfere with.

In view of the foregoing the opinion of the court is, that the verdict should have been corrected so as to find respondent guilty of contributory negligence, and that judgment should have been rendered on the corrected verdict for defendant.

By the Court.—The judgment is reversed, and the cause remanded with directions to correct the verdict in accordance with this opinion and to render judgment in favor of the defendant.

WINSLOW, C. J., and DODGE, J., dissent.

HUBBARD, Respondent, vs. FERRY, Appellant.

October 29—November 12, 1909.

Partnership: Transfer of interest in "stock, fixtures, and accounts" does not include liability of embezzler: Apportionment of sum recovered: Evidence: Burden of proof: Hearsay.

1. A bill of sale by which one partner transferred to the other all his interest in the "stock, fixtures, and accounts" of a going retail business did not cover the liability, then unknown and unsuspected, of an employee to the firm for property or moneys embezzled, or convey any interest in the amount afterwards collected upon a settlement with such employee, whether that amount be considered as reimbursement, as damages, or as a price of immunity from prosecution.
2. The vendee in the bill of sale having been the active manager of the business, and having continued it after such sale, and having received the amount collected from the embezzler in adjustment of a liability in part to the firm and in part to himself on account of embezzlements extending through a period both before and after the dissolution, the burden was primarily upon him, in an action for an accounting, to show what part belonged to himself as distinguished from that which belonged to the firm.
3. An apportionment of the amount collected in such case equally over the whole period of the embezzler's employment, both by the firm and by the partner continuing the business, is *held* to be sustained by the evidence.
4. Admissions by the embezzler to both parties, prior to the settlement, that the embezzlements had extended over the whole period of his employment, even if not competent evidence of the fact of embezzlements during the term of the partnership, are evidence tending to show that the settlement was made on the basis of embezzlements extending through that time, and that the amount collected belonged in part to the firm.

APPEAL from a judgment of the circuit court for Eau Claire county: JOHN K. PARISH, Judge. *Affirmed.*

Plaintiff and defendant were equal partners in a retail jewelry business from October 1, 1900, until March, 1906, defendant being the active manager of the business, and

plaintiff, who was a practicing lawyer, taking no part therein. At the latter date plaintiff sold out to the defendant, giving him a written bill of sale conveying all his interest in the "stock, fixtures, and accounts." Defendant continued the business under the same name of J. G. Ferry & Co. Throughout most of the partnership period and subsequently, one Jackson, a jeweler, watchmaker, and engraver, was employed as substantially the only assistant in running the business. In March or April, 1907, the defendant became suspicious of Jackson and consulted with the plaintiff in regard to steps that might be taken to discover any peculations of his and to recover from him, defendant claiming that he so consulted plaintiff as an attorney at law, and plaintiff claiming to have understood that he consulted with him as a former partner interested in the recovery. Various suspicious circumstances having been discovered, defendant confronted Jackson with the charge and obtained from him a confession that he had been embezzling property and money and that such embezzlement had extended not only through the year after defendant had bought out plaintiff, but for a somewhat indefinite time prior thereto. Defendant obtained from him a return and surrender of certain property and $1,000 in money, all of which the court found to amount to $1,600, and gave an acquittance signed by firm name after protest against one with his individual signature. He refused to account to plaintiff for any part thereof, except a reasonable attorney's fee.

This action was brought praying reformation of the bill of sale from plaintiff to defendant so as to exclude any rights against Jackson which plaintiff might have, and to require defendant to account for one half of any sums received by him in compromise of Jackson's liability to the firm. The court decided in plaintiff's favor, holding that the bill of sale should be so reformed, and that the sum of $1,600 received by defendant must be apportioned equally over the whole period of Jackson's employment, both by the firm and afterwards by de-

fendant, and accordingly rendered judgment in favor of the plaintiff for $661.94 and interest from the time of the commencement of the action, from which judgment the defendant appeals.

For the appellant there was a brief by *Bundy & Wilcox,* and oral argument by *C. T. Bundy.*

For the respondent there was a brief by *Arthur H. Shoemaker* and *James Wickham,* and oral argument by *Mr. Wickham.*

DODGE, J. It is in our view unnecessary to discuss the propriety of the reformation of the bill of sale. We deem that action unnecessary and therefore immaterial. It would be doing great violence to the ordinary use of terms to consider a mere formal transfer of "stock, fixtures, and accounts" in a going retail business to include an unknown and an unsuspected liability of an embezzler of either the property or the moneys of the concern, and there is nothing amongst the surrounding circumstances to warrant extending the natural construction of the words of the instrument to such an extent. Whether the amount recovered from Jackson be considered as reimbursement, as damages, or as a price of immunity from prosecution, we are satisfied no interest therein was conveyed by this so-called bill of sale from plaintiff to defendant.

The correctness of the court's conclusion of fact from the evidence that this settlement covered assumed peculation and embezzlement during both the period of the partnership, when plaintiff would have had an interest in the property embezzled, and the succeeding period, when defendant was alone the sufferer, depends on the view taken of many and various items of evidence, on the resolution of many ambiguous and conflicting statements, and on the inferences to be drawn therefrom. This court does not sit to consider such questions originally. Even if we were satisfied that we should have reached a different conclusion from that of the trial court,

that of itself would not justify a reversal. We have carefully and anxiously examined all this evidence, and we are unable to say either that there is any clear preponderance against the trial judge's findings or that there is no evidence which upon some reasonable construction and inference might support his conclusion. Especially is this true with reference to the method of apportionment of the amount recovered, when we realize that after having found that the payment was made and received in adjustment of a liability in part at least to the firm, the duty fell upon the defendant, as the manager of an enterprise in which others were interested with him, to make full accounting, and the burden of proof was upon him primarily to furnish evidence upon which to ascertain the portion of the amount collected which pertained to his own private interests as distinguished from the joint interest of himself and plaintiff. *Lessel v. Zillmer,* 105 Wis. 334, 338, 81 N. W. 403; *Somervaill v. McDermott,* 116 Wis. 504, 508, 93 N. W. 553; *Chaffee v. Conway,* 125 Wis. 77, 80, 103 N. W. 269. For these reasons the judgment must be affirmed.

One contention of the appellant should perhaps receive special attention. That is, that there was absolutely no evidence that Jackson was guilty of any embezzlement or misappropriation during the term of the partnership; that the only evidence offered on this subject was Jackson's admission made to plaintiff and defendant prior to the settlement or compromise, and that such hearsay declarations of a third party are not evidence. Conceding, *arguendo,* that such admissions are not evidence of the fact of embezzlement, yet they constitute one of the surrounding circumstances under which defendant insisted upon the payment of a sum of money and under which Jackson yielded to such insistence and paid the sum which defendant in fact received. They, therefore, being such a circumstance, tend to justify the inference of the trial court, embodied in the finding, that the settlement was made on the basis of uncertain embezzlements extending

throughout Jackson's employment, whether by the firm or by the defendant individually, and tend to justify the conclusion that the money received by defendant was in part at least, in the intention of the parties, due to invasions of the rights of the partnership.

By the Court.—Judgment affirmed.

SKOW, Respondent, vs. GREEN BAY & WESTERN RAILROAD COMPANY, Appellant.

October 29—November 12, 1909.

Carriers: Negligence: Injury to passenger alighting from train: Unsafe place: Insufficient lighting: Questions for jury: Contributory negligence: Evidence: Damages: Prospective profits or earnings of married woman: Reducing damages to cure error: Appeal: Printed case: Costs.

1. It is the duty of a common carrier of passengers to furnish a reasonably safe place for passengers to alight from trains; and for injury to a passenger exercising due care, caused by negligent failure to perform such duty, the carrier is liable.
2. Evidence showing that there was a space of about fourteen inches between the edge of the lowest step of a passenger car and the edge of the depot platform, which was about six inches below the step and about twenty-two inches above the level of the ground, and tending to show that the place was not sufficiently lighted to enable passengers to see such open space at the time when plaintiff, alighting from the train in the night, stepped or fell between the car step and the platform, is *held* to sustain findings by the jury to the effect that the place so provided for passengers to alight was not reasonably safe.
3. A finding that plaintiff was not guilty of contributory negligence is also *held* to be sustained by the evidence.
4. Where, in an action by a married woman for personal injuries, defendant was permitted to show generally that plaintiff's husband had difficulties with persons for whom he sold goods as to his returns on sales, that she had knowledge thereof, and that it caused her trouble and worry, it was not error to ex-

clude further evidence to show specifically a defalcation of the husband and plaintiff's knowledge thereof as accounting for her insomnia, which she attributed to her injuries.

5. In an action by a married woman for personal injuries it appeared that she was a nurse by profession and had engaged in nursing at irregular intervals before and from time to time after her marriage, that she had done no nursing for about a year prior to the accident, and that she was not then established as a nurse at the place of her residence. She testified that she had expected to do nursing or start a hospital at that place within a few months after the time of the accident. *Held*, that these facts were insufficient to warrant a recovery for loss of prospective profits or individual earnings in her separate business.

6. The jury in such case having been erroneously allowed to consider evidence on which they might have awarded compensation for prospective loss to plaintiff's separate business and individual earnings, reduction of the damages awarded from $2,500 to $1,500 is deemed sufficient to cure the error.

7. Costs are not allowed for the printing of a case in violation of Supreme Court Rule 6.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Reversed.*

This is an action for damages for personal injuries alleged to be due to the negligence of the defendant. Defendant is a railway company operating a railroad. At the time of the trial of the action plaintiff was a woman thirty-three years of age. She had been married for eleven years. There were no children. Prior to her marriage she had been employed as a nurse, and after her marriage she had done more or less of it during the four years she and her husband lived at Winona, Minnesota, during the two years they lived at Galesville in this state, and during the three years they lived in Vernon county. She had done no nursing after the removal of herself and her husband to Black River Falls, which was about four months before the injuries were received. When she went out nursing she paid from her earnings for the help which was required to perform the household duties in her home. For a while she had run a hospital of her own at Galesville. Her earnings while nursing were from $10 to

$25 per week, depending on the nature and seriousness of the illness and the ability of the patient to pay. For upwards of a year before the trial she had done no nursing, but she testified that she intended to start up a hospital in the spring. Plaintiff stated that she could not state how many months or weeks she spent in nursing, but that she went out whenever she felt like it.

The injuries were received in alighting from a passenger coach of the defendant onto the depot platform at Merrillan, Wisconsin. The distance from the outer edge of the lowest car step to the outer edge of the depot platform was thirteen and five-eighths inches. The depot platform was five and three-fourths inches lower than the last car step, and the distance in a direct line from the edge of the lowest car step to the edge of the platform was fourteen and one-half inches. The platform was twenty-one and five-eighths inches above the level of the ground underneath. Ten days previous to the day of injury the plaintiff had entered defendant's train at this place in the daytime. The plaintiff on January 8, 1908, was a passenger on the train of the defendant from Taylor station, Jackson county, Wisconsin, to the village of Merrillan, Wisconsin. The train was due at Merrillan at 8 o'clock. Shortly before the train arrived at the station the station was called, and upon arrival the plaintiff followed the conductor of the train through the door of the car onto the platform and down the steps. The evidence is in conflict as to whether or not the conductor assisted the plaintiff in stepping from the car step onto the platform and as to whether or not the plaintiff's foot touched the platform. Plaintiff testified that she stepped into the open space between the car step and the platform; that she fell to the ground, and then forward upon the platform. Some seventy feet from the place of injury an electric light of thirty-two candle power was fastened by a bracket over the entrance of the Campbell hotel. There is evidence that this light was dim and probably not more than ten candle power. The evidence is in conflict as to whether or not the

conductor carried a lantern. Aside from this lantern, the electric light at the hotel entrance, which had a reflector above it to throw the light toward the place of injury, was the only light which could reach the place of injury directly. From the windows of the hotel and the depot building, which were from fifty-nine to seventy feet from the place of injury, some light shone indirectly. The lights of the train were also burning. The evidence is that the night was dark. Plaintiff testified that the darkness prevented her from distinguishing the depot platform from the opening between it and the car step. The conductor assisted the plaintiff to arise after she had fallen, and into the waiting room of the depot. About three hours later the plaintiff took a train on another line of railroad from the same platform for her home in Black River Falls. She walked from the conveyance which had taken her from the depot to her home into the house. In the afternoon of the next day the plaintiff called her physician. He found "a swelling of the right knee; a discoloration of the knee, extending up the thigh as far as the hip of the right side;" "a swelling of the right ankle;" "a swelling of the left ankle, and evidence of severe contusion at the junction of the lower third with the upper two-thirds of the leg, and discoloration of the whole leg from the ankle to the knee;" "a slight depression into the bony tissue of this shin bone;" "a displacement backward of the womb, and considerable tenderness and swelling in the region in and about the womb and over it." There was evidence that the displacement of the womb was probably congenital. The plaintiff lay abed for two weeks, the physician calling daily. For some time thereafter she called at her physician's office every other day. The evidence was to the effect that the displacement of the womb would require a surgical operation for its correction.

The court submitted a special verdict as follows:

"(1) Was the plaintiff injured on the 8th day of January, 1908, at the station of the defendant, while alighting from the defendant's train? *A.* (by the court) Yes.

"(2) Did the defendant fail to exercise ordinary care in the manner in which the platform was constructed at the point where the accident occurred to the plaintiff, in respect to the relation of the platform to the car step? *A.* Yes.

"(3) If you answer the last question 'Yes,' then was such failure to exercise ordinary care in the construction of the platform a proximate cause of plaintiff's injuries? *A.* Yes.

"(4) Did the defendant fail to exercise ordinary care in the lighting of the platform at the time and place of the accident, in that the platform was insufficiently lighted to enable a passenger in the exercise of care to descend from the car steps to the platform with reasonable safety? *A.* Yes.

"(5) If you answer the last question 'Yes,' then was such failure to exercise ordinary care in the lighting of the platform a proximate cause of plaintiff's injuries? *A.* Yes.

"(6) Was the plaintiff guilty of any want of ordinary care which proximately contributed to her injury. *A.* No.

"(7) If the court shall be of opinion that plaintiff is entitled to recover, at what sum do you assess her damages? *A.* Two thousand five hundred dollars."

The court refused to submit a special verdict of twelve questions as requested by the defendant. The special verdict which was submitted covers the questions embraced in the special verdict requested by the defendant with the exception of five questions, which do not embrace any issues raised by the pleadings and refer to mere conflicts in the evidence. Judgment was entered upon the special verdict as found for the plaintiff. This is an appeal from the judgment.

G. M. Perry, for the appellant.

L. O. Ellis, attorney, and *S. M. Marsh,* of counsel, for the respondent.

SIEBECKER, J. The law is well established in the adjudications of this court that it is the duty of common carriers of passengers to furnish a reasonably safe place for passengers to alight from trains, and if such carrier negligently fails to perform this duty and thereby proximately causes injury to a passenger in the exercise of due care the carrier is liable for

the resulting damage. *McDermott v. C. & N. W. R. Co.* 82 Wis. 246, 52 N. W. 85, and cases there cited. The jury found that the defendant failed in two respects in its duty to furnish a reasonably safe place for passengers to alight: (1) In so constructing its depot platform as to leave a dangerously large space between the platform and the lowest step of the passenger car; and (2) in furnishing insufficient light at this place to enable passengers to see this open space between the platform and step. The evidence shows that the platform was used for the conduct of defendant's passenger business in the day and night time. As stated in *Patten v. C. & N. W. R. Co.* 32 Wis. 524:

"Whether there was a want of such care and prudence as the company should exercise, in a particular case, in not having a light in or about the depot when plaintiff left the train is not a pure question of law. but rather one of law and fact. In some cases it might constitute negligence, and in others not. . . . But where the question is one of law and fact, or of a mixed character, it should be left to the jury."

An examination of the evidence in this case shows that it is not so clear that sufficient light was provided as to exclude all inferences that the platform was insufficiently lighted at the place of alighting from the train. There is evidence tending to show that this place was insufficiently lighted for passengers to observe the open space between the step and the platform, and that no light, or at most only a very dim light, reached to the place for alighting from the train. If the jury found either of these conditions, the company was guilty of negligence in not providing sufficient light to enable its passengers to alight in safety. *Duell v. C. & N. W. R. Co.* 115 Wis. 516, 92 N. W. 269. Since the platform was to be used in the nighttime by the aid of artificial light, we cannot say as matter of law that the space between the lower step of the coach and the platform made this a reasonably safe place for passengers to alight from trains. The fact that passengers

might readily have observed the open space in the daytime, and that when so observed by them it was a reasonably safe place to alight from trains, does not meet the situation presented here, which required the use of the platform in the nighttime. There is an obvious and marked difference in seeing the open space on these different occasions; and while a place might clearly be reasonably safe for use by daylight, we cannot say it would be so by artificial light. And so here, under the evidence tending to show that the open space could not be seen under the condition of the artificial light provided, it was properly left for the jury to determine whether or not the company performed its duty of furnishing a reasonably safe place to alight from the train, and the verdict as to this issue must stand.

Appellant's counsel, in his argument to show that the defendant was not negligent in the respects alleged, makes assertions and statements to the effect that the plaintiff miscalculated the distance from the car step to the platform; that she failed to call on the trainmen for assistance when she observed that it was dark; that she evidently omitted to look where she was about to step and to locate the platform before stepping off the lowest car step; and that she neglected to retain a hold on the iron railing at the side of the steps while descending. On these assertions counsel predicates the claim that such conduct on her part constitutes negligence contributing to cause her fall and to produce the injuries. The infirmity of these claims is that there are facts and circumstances shown by the evidence either negativing these assertions of fact or giving explanations which left their existence or nonexistence to be found by the jury. Upon the evidence the jury might well have concluded that the plaintiff was ordinarily careful in alighting from the train and we cannot, therefore, disturb their finding on this issue.

Exceptions are urged upon rulings on the admission and rejection of evidence, of which the following only need be no-

ticed: The defendant offered a witness to show specifically the defalcation of plaintiff's husband in his business and her knowledge thereof, as explanatory of and as accounting for her insomnia, but which she attributed to the injuries received in the accident. The court permitted counsel to show generally that her husband had difficulties with persons for whom he sold musical instruments respecting his returns on sales of pianos, that she had knowledge thereof, and that it caused her trouble and worry. We think these matters were sufficiently gone into to enable the jury to determine whether it affected her health or caused her sleeplessness, as claimed by the defendant. In view of the state of this branch of the case no error was committed in excluding further details of the husband's business affairs.

An exception is insisted on to the admission of evidence in behalf of the plaintiff tending to show that she was a nurse by profession, that she had been engaged in the business after her marriage, and that she expected to conduct it as her separate business in the future. The admission of this evidence becomes immaterial in the view we take of this branch of the case in relation to the claim that the damages are excessive. As appears in the foregoing statement, the plaintiff engaged in nursing before and from time to time after her marriage. It also appears that she engaged in such nursing at irregular intervals and on occasions when she felt so inclined. Her testimony also discloses that she did no nursing for about a year immediately preceding the accident, that she was not established as a nurse at Black River Falls, and that she had expected to do nursing again at this place some time in the spring of the year in which the injuries were received. Giving the fullest weight to the evidence on this subject, it fails to show that she was engaged in a separate business or that she was engaged in performing services whose proceeds she was entitled to retain as her individual earnings. Nor does it show with reasonable certainty that she was about to engage

in such services or business in the future. Furthermore, if it be assumed that she would engage in nursing at some future time, it still remains an imaginary and speculative question whether she has sustained a loss to her prospective business or individual earnings. We are persuaded that the evidence as to her separate business and individual earnings is wholly insufficient to establish a loss with that reasonable certainty required by the law to permit a jury to allow her damages therefor.

A liability of the defendant for the damages plaintiff has suffered has been found by the jury; but, since the court improperly submitted evidence to them on which they may have awarded her compensation for the prospective loss to her separate business and individual earnings, we have concluded that the amount allowed the plaintiff as compensatory damages ought to be reduced by the amount allowed by the jury as the damages to her prospective separate business and individual earnings. In view of the evidence of damages for which she was entitled to recover, the jury could not have allowed plaintiff as damages to her prospective separate business and earnings to exceed $1,000. In our judgment a reduction to $1,500 of the amount allowed the plaintiff as compensatory damages will in all reasonable probability cure the error of submitting to the jury the evidence of damages suffered by plaintiff to her prospective separate business and individual earnings. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644.

The printed case is not in conformity to Supreme Court Rule 6, which requires that it shall contain an abridgment of the record so far as necessary to present the questions for decision. As is said in *Johanson v. Webster Mfg. Co.* 139 Wis. 181, 120 N. W. 832, so it is here: "Counsel have attempted no abridgment of the evidence, but apparently have printed in full the reporter's minutes. . . ." Compliance with the rule demands that the printed case shall contain in narrative form

an abridgment only of the evidence so far as is required by the questions for decision. Counsel owe the duty of compliance with the court's rules to aid in an expeditious and orderly presentation and examination of the cases on appeal. Costs for printing a case not complying with the rules are forbidden by Rule 44.

No other question requires consideration.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial; with the option, however, to the plaintiff, within twenty days after the filing of the *remittitur,* to take judgment against the defendant for the sum of $1,500 and costs. No costs are to be taxed for printing the case on appeal.

STATE vs. HALL.

October 29—November 12, 1909.

Criminal law: Pleading statutory offense: Employment of child in place where intoxicating liquor is sold: "Beer garden:" Validity of contract immaterial: Construction of statutes: Independent contractor.

1. A complaint charging that defendant employed a child under the age of sixteen years in a "beer garden" states an offense under subd. 2, sec. 1728*a*, Stats. (Laws of 1907, ch. 523), forbidding the employment of such a child "in any place where intoxicating liquors are made, given away or sold."
2. Failure to charge a statutory offense in the language of the statute does not render the complaint insufficient if no substantial right of the defendant is affected and he is not prejudiced thereby.
3. The engagement of children in the kinds of work specified was the evil sought to be guarded against by subd. 2, sec. 1728*a*, Stats. (Laws of 1907, ch. 523), and the fact that the engagement was under a contract void because for labor to be performed on Sunday, does not preclude a prosecution of the employer.
4. The evil which a statute is designed to cure may be considered in construing it.

5. Defendant, the manager of a beer garden, contracted with an adult to furnish music therein for a gross sum. He neither knew nor saw at the time any of the musicians except the person with whom he contracted, and had no knowledge as to their ages. That person employed a minor under sixteen years of age to assist with others in furnishing the music; but after defendant's attention was called to that fact he caused the minor to be discharged. *Held*, that the person contracted with was not, within the meaning of sec. 1728*h*, Stats. (Laws of 1907, ch. 523), defendant's agent, servant, or foreman in employing the minor, and that the violation, if any, of subd. 2, sec. 1728*a*, was not by defendant.

REPORTED from the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *First question answered in the affirmative; second and third questions in the negative.*

This is a criminal prosecution in which action was brought upon the following complaint:

"Ira Lockney, being first duly sworn, on oath complains to the district court of the county of Milwaukee that *Allen L. Hall* on the 5th day of July, A. D. 1908, in the county of Milwaukee, Wisconsin, being then and there the manager of a beer garden, did unlawfully employ and permit one Constantine Schoen, a child then and there of the age of fifteen years, to be employed and to work in said beer garden, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Wisconsin, and prays that the said *Allen L. Hall* may be arrested and dealt with according to law."

Upon trial the defendant was convicted of employing a boy under the age of sixteen years in violation of the statutes. During the trial questions of law arose which, in the opinion of the trial judge, required the decision of this court, whereupon at the request and upon the consent of defendant and before judgment the court below certified the following questions:

"(1) Does the complaint in this action state an offense under the statutes of the state of Wisconsin?

"(2) Does the fact that the contract was for the employ-

ment of labor to be performed on Sunday prevent a prosecution under the statutes referred to in the first question herein?

"(3) Would the fact that the defendant contracted with a man above the age of sixteen years to furnish to the defendant a band of music at a gross sum, and the defendant neither knew nor saw any of said musicians, except the person with whom he contracted, and had no knowledge of their ages, and the person with whom defendant contracted employed the boy Constantine Schoen, of but fifteen years of age, who assisted said employer, with others, in furnishing music at defendant's park, and after the attention of defendant was called to the fact that said boy, who was then playing a violin thereat, was under the age of sixteen years, he caused the discharge of such minor, render the defendant liable under said complaint and statutes referred to in the first question?"

Before any evidence was offered the defendant demurred to the complaint and moved to quash the warrant, for the alleged reason that no offense was stated, which demurrer and motion were overruled and exception taken thereto. After the state closed its case, motion was made to discharge the defendant, which was denied and exception taken. After trial and conviction, but before sentence, the defendant moved in arrest of judgment.

For the plaintiff there was a brief by *A. C. Backus,* district attorney, *Norman L. Baker,* assistant district attorney, and the *Attorney General,* of counsel, and oral argument by *Mr. Baker.*

A. H. Blatchley, for the defendant.

KERWIN, J. Three questions are certified here to be answered by this court which are set out in the statement of facts. The first is as to whether the complaint states an offense. The argument is made that it does not, because it alleges only that the infant, Constantine Schoen, under the age of sixteen years, was employed to work in a beer garden, and that a beer garden cannot be said to be a "place where intoxicating liquors are made, given away or sold" under the provi-

sions of subd. 2, sec. 1728*a*, Stats. (ch. 523, Laws of 1907). We cannot agree with counsel in this contention. The words of the statute must be construed in their plain and ordinary sense, and in giving them such construction we think the words "beer garden" must be understood to mean a place where intoxicating liquors are given away or sold. *Harrington v. Smith*, 28 Wis. 43; *State ex rel. Davis & S. L. Co. v. Pors*, 107 Wis. 420, 83 N. W. 706; *Miller v. C. & N. W. R. Co.* 133 Wis. 183, 113 N. W. 384. Independent of the popular understanding of the words "beer garden," it is obvious from the connection in which they have been used in former statutes that they were intended by the legislature to mean such place. *Bloch v. American Ins. Co.* 132 Wis. 150, 112 N. W. 45; *Davis v. State*, 134 Wis. 632, 115 N. W. 150. A beer garden being known to be a place where intoxicating liquor is sold or given away, the charge in the complaint was sufficient though not in the language of the statute. Sec. 4669. Stats. (1898). While doubtless it would have been better practice to have charged the offense in the language of the statute, no substantial right of the defendant was affected nor was he prejudiced; therefore the failure to charge the offense in the language of the statute should be disregarded. Sec. 2829, Stats. (1898); also, secs. 4658, 4659, 4706, Stats. (1898); *Bowers v. State*, 122 Wis. 163, 99 N. W. 447; *Hanley v. State*, 125 Wis. 396, 104 N. W. 57; *Brown v. State*, 127 Wis. 193, 106 N. W. 536; *State ex rel. McKay v. Curtis*, 130 Wis. 357, 110 N. W. 189. It is also insisted that the complaint is bad because it does not negative the exception contained in sec. 1728*a*—1, Stats. (ch. 418, Laws of 1907) and other statutes respecting the consent of the commissioner of labor or other officer mentioned in the statute, but it will be seen that this exception has not been carried into subd. 2, sec. 1728*a*, Stats. (ch. 523, Laws of 1907). We therefore think the complaint states a good cause of action, and the first question must therefore be answered in the affirmative.

The second question is whether the employment of labor to be performed on Sunday prevents prosecution under the statute. The argument of counsel for defendant under this head is, in substance, that because such contract would be void no prosecution could be had under such an agreement. Subd. 2, sec. 1728*a*, Stats. (ch. 523, Laws of 1907), provides:

"No child under the age of sixteen years shall be employed in adjusting any belt . . . or in any place where intoxicating liquors are made, given away or sold. . . ."

The engagement in service was obviously the evil intended to be guarded against; and whether the means which brought about such service or engagement amounted to a void contract is wholly immaterial. The evil which a statute is designed to cure may be considered in construing it. *Minneapolis T. M. Co. v. Haug,* 136 Wis. 350, 117 N. W. 811; *Cohn v. Neeves,* 40 Wis. 393; *Johnson v. Huber,* 117 Wis. 58, 93 N. W. 826; *State v. Foster,* 37 Iowa, 404; *McCluskey v. Cromwell,* 11 N. Y. 593; *Carpenter v. Strickland,* 20 S. C. 1. Therefore we think the second question should be answered in the negative.

The third question is the one which has caused us the most trouble. From the facts set forth under this head it appears that the defendant contracted with an adult to furnish music at a gross sum, and that defendant at the time of employment neither knew nor saw any of the musicians except the person with whom he contracted, and had no knowledge of their ages, and the person with whom defendant contracted employed the minor under sixteen years of age to assist him with others in furnishing the music, and after the attention of defendant had been called to the fact of such employment he caused the boy's discharge. It is true the statute providing the penalty (sec. 1728*h*, Stats.: ch. 523, Laws of 1907) is very broad and reaches any person who, whether for himself or by himself "or through agents, servants, or foreman," shall violate, etc. But it must receive a reasonable construction, and so construing it we think it does not reach the case before us. In the instant

case the defendant contracted with one who was of full age to furnish the music, and had no direct connection with the employment of the minor, never consented to his employment, and, as soon as he discovered that he had been employed and was under sixteen, immediately caused his discharge. The person who violated the statute in the instant case, if there has been such violation, is the person who employed the minor, not the defendant, who merely contracted with a person above the age of sixteen for the music. The defendant here did not contract with the boy under sixteen, either himself or through an agent. It does not appear from the question submitted that the person with whom defendant contracted was an agent of the defendant for the purpose of employing musicians or otherwise. He was bound by his contract to furnish music, and the persons whom he employed to assist him in that regard were his agents, and, if he violated the law in the employment of a minor under sixteen, he, and not the defendant, was liable under the law. We therefore think the third question should be answered in the negative.

It follows that the first question certified must be answered in the affirmative, and the second and third in the negative.

By the Court.—It is so ordered.

PENNELL, Plaintiff in error, vs. THE STATE, Defendant in error.

October 30—November 12, 1909.

Intoxicating liquors: Statutes construed: Sale of "malt liquor:" Evidence: Constitutional law: Police power.

1. The word "liquor" and the associated word "drinks" in a statute regulating or forbidding the sale of intoxicants mean an alcoholic beverage.

2. Sec. 1565c, Stats. (1898), forbidding the sale in no-license territory of "any spirituous, malt, ardent or intoxicating liquors or drinks," forbids the sale of fermented malt liquor containing alcohol, whether intoxicating or not.

[3. Whether in sec. 1565, Stats. (Supp. 1906; Laws of 1905, ch. 341),—providing that "in all cases proofs of the sale or giving away of any malt, spirituous, vinous or distilled liquor of any name or nature whatsoever shall be deemed proof of the sale or giving away of intoxicating liquors without proof that the liquor so sold or given away was in fact intoxicating,"—the words "shall be deemed proof" create merely a rebuttable presumption or mean conclusive evidence of the fact that the liquor was intoxicating, not determined.]

4. In enacting a police regulation the legislature may include within the purview of the statute acts innocent and not in themselves the subject of police regulation, where the inclusion of such acts is necessary, in the opinion of the legislature, to make the police regulation effective.

5. On the principle above stated it was competent for the legislature by sec. 1565c, Stats. (1898), to forbid the sale in no-license territory of any fermented malt liquor containing alcohol.

ERROR to review a judgment of the circuit court for Vernon county: JAMES O'NEILL, Judge. *Affirmed.*

C. W. Graves, for the plaintiff in error, cited, among other authorities, secs. 1565, 1565*c*, Stats. (1898); ch. 284, Laws of 1883; Jones, Ev. (2d ed.) § 128 (129); *Briffitt v. State,* 58 Wis. 39, 16 N. W. 39; *Brown v. Piper,* 91 U. S. 37; *Stoner v. State,* 5 Ga. App. 716, 63 S. E. 602; *Blatz v. Rohrbach,* 116 N. Y. 450, 22 N. E. 1049; 57 Cent. Law J. 310; *State v. Laffer,* 38 Iowa, 422; *Hardwick v. State,* 55 Tex. Crim. 140, 114 S. W. 832; *State v. Giersch,* 98 N. C. 720, 4 S. E. 193; *Connolly v. Atlanta,* 79 Ga. 664, 4 S. E. 263.

For the defendant in error there was a brief signed by *J. Henry Bennett,* district attorney, and oral argument by *Mr. Bennett* and by *A. C. Titus,* assistant attorney general. They cited *State v. York,* 74 N. H. 125, 65 Atl. 685, 13 Am. & Eng. Ann. Cas. 116; *Luther v. State,* 83 Neb. 455, 120 N. W. 125, 20 L. R. A. N. S. 1146; *Eaves v. State,* 113 Ga. 749, 39 S. E. 318; *Bradshaw v. State,* 76 Ark. 562, 89 S. W.

1051; *Feibelman v. State,* 130 Ala. 122, 30 South. 384; *State v. Frederickson,* 101 Me. 37, 63 Atl. 535, 6 L. R. A. N. S. 186, and note; *People v. Adams,* 95 Mich. 541, 55 N. W. 461; *State v. Ely* (S. Dak.) 118 N. W. 687; *Briffitt v. State,* 58 Wis. 39, 16 N. W. 39.

TIMLIN, J. The plaintiff in error was convicted upon a charge of having, on November 28, 1908, sold certain spirituous, malt, ardent, and intoxicating liquors and drinks in the city of Viroqua, contrary to a vote of the qualified electors of that city at an election held April 7, 1908, pursuant to secs. 1565*a*, 1565*b*, Stats. (1898). When the case was called and ready for trial the following stipulation was made between the attorneys for the respective parties:

"(1) That all the formal allegations of the complaint with relation to the election and negativing the right of the defendant to vend, deal, or traffic in, or give away any malt, spirituous, ardent, or intoxicating liquors or drinks in any quantity whatsoever and of any name whatsoever as a beverage or otherwise are true as therein stated.

"(2) That at the time and place alleged the defendant sold as a beverage to one C. J. Smith two quart bottles of fermented malt liquor manufactured by the Lauritzen Malt Co. of Minneapolis, Minnesota, from barley malt and foreign and domestic hops, containing the following percentage of alcohol, to wit: 1.44 by weight and 1.84 by volume, which said liquor so sold was labeled as follows: 'Non-Intoxicating. A Fermented Liquor. Gold Foam. Guaranteed Less Than Two % Alcohol By Weight. Made From Choicest Selected Materials. Bottled For Export. Lauritzen Malt Co. Minneapolis, Minnesota.'

"(3) That the defendant claimed said liquor so sold to be not intoxicating in fact, and hereby reserves the right to offer to prove, and to prove in fact if permitted by the court, that such liquor was not intoxicating. The state reserves the right to prove, and prove if permitted, that it was intoxicating in fact."

Having offered this stipulation the state rested its case, whereupon the plaintiff in error offered himself as a witness

to show that the liquor in question was a nonintoxicating liquor. On objection by the state the court excluded this evidence, and the jury found the plaintiff in error guilty after having been instructed by the court to the effect that it was not necessary for the jury to determine whether this fermented malt liquor was or was not intoxicating in fact. "If it was a fermented malt liquor containing alcohol, as admitted in the stipulation, it is really immaterial how much alcohol it contained. The statute prohibits the sale of malt liquor, and is conclusive."

The word "liquor" in a statute regulating or forbidding the sale of intoxicants should be taken to mean an alcoholic beverage. Cent. Dict.; Standard Dict.; *People v. Crilley,* 20 Barb. 246; *U. S. v. Cohn,* 2 Ind. Terr. 474, 52 S. W. 38. The associated word "drinks" in such statute means an alcoholic beverage. *State v. Oliver,* 26 W. Va. 422. Alcohol is a product of fermentation. Malting is a process preliminary to fermentation. Alcohol is separated, not produced, by distillation, and the liquor thus separated containing a percentage of alcohol is called spirituous liquor. Where there is no such separation, but the alcohol produced by fermentation remains in the liquid drawn off from the malt, the product is called malt liquor. Where the production of alcohol by fermentation is preceded by no malting process, as in the case of wine, the product is called vinous liquor. So that under sec. 1565*c*, standing alone, an offense was committed if the accused sold ardent drinks or malt drinks or spirituous drinks, or ardent liquor or malt liquor or spirituous liquor, as well as if he sold intoxicating liquors or drinks. Each is apparently prohibited by this statute. But this is not all the statute law on the subject, for sec. 1565, as amended by ch. 341, Laws of 1905, provides that it shall not be necessary to allege or state in the complaint, information, or indictment the kind or quantity of liquor sold or the person to whom the same was sold, but it shall be sufficient to allege generally that the accused sold intoxicating liquor at a time and place mentioned, etc. This

would seem to indicate a legislative understanding that the malt or ardent liquor or other liquid sold must have been intoxicating, or else that all alcoholic beverages are intoxicating if taken in sufficient quantity, as stated by Judge BREWER in *Intoxicating Liquor Cases,* 25 Kan. 751. The statute last referred to also provides:

"In all cases proofs of the sale or giving away of any malt, spirituous, vinous or distilled liquor of any name or nature whatsoever shall be deemed proof of the sale or giving away of intoxicating liquors without proof that the liquor so sold or given away was in fact intoxicating."

Plaintiff in error contends that the words "shall be deemed proof" merely mean to create a rebuttable presumption of the fact that the liquor was intoxicating, while the counsel for the state contends that the words "shall be deemed proof" are to be taken to mean conclusive evidence. We are cited to many cases on this point defining and applying the word "proof." *Buffalo & S. L. R. Co. v. Reynolds,* 6 How. Pr. 96; *Nevling v. Comm.* 98 Pa. St. 322; *People v. Beckwith,* 108 N. Y. 67, 15 N. E. 53; *People v. Bowers* (Cal.) 18 Pac. 660; *Briffitt v. State,* 58 Wis. 39, 16 N. W. 39. We do not find it necessary to construe this last-mentioned paragraph of the statute.

The plaintiff in error here by stipulation admitted the sale of fermented malt liquor containing 1.84 per cent. of alcohol in volume. By this admission he not only brought himself within the descriptive words of sec. 1565*c,* but he admitted an offense under that section; that is, he supplied evidence that he sold a malt liquor containing alcohol. The legislature had power to forbid this sale and did so by sec. 1565*c.* In enacting a police regulation it may be found necessary to include within the purview of the statute certain acts innocent and not in themselves the subject of police regulation, where the inclusion of such acts is necessary, in the opinion of the legislature, to make the police regulation effective, as in *Booth v. Illinois,* 184 U. S. 425, 22 Sup. Ct. 425, where in

the effort to reach and repress gambling contracts relating to future deliveries of grain, the legislature made it a criminal offense for one to have himself or to give to another the option to sell or buy at a future time any grain or other commodity, and the law was upheld as a lawful exercise of the police power; or, to quote from *Otis v. Parker,* 187 U. S. 606, 23 Sup. Ct. 168, where an act of the people of a state in the adoption of a state constitution provided that all contracts for the sale of shares of the capital stock of any corporation or association on margin or to be delivered at a future day shall be void:

"If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.' "

This principle has been applied to liquor laws quite uniformly and with reference to statutes substantially like ours which prohibited the sale, not only of intoxicants, but of those nonintoxicating beverages the sale of which might easily be made a cover for the sale of intoxicants. *Feibelman v. State,* 130 Ala. 122, 30 South. 384; *Eaves v. State,* 113 Ga. 749, 39 S. E. 318; *Luther v. State,* 83 Neb. 455, 120 N. W. 125, 20 L. R. A. N. S. 1146; *State v. O'Connell,* 99 Me. 61, 58 Atl. 59; *Hatfield v. Comm.* 120 Pa. St. 395, 14 Atl. 151; *State v. Ely* (S. Dak.) 118 N. W. 687. We are not obliged to go so far in the instant case, because here the beverage sold was not only within the prohibitory terms of the statute, but contained the intoxicating element in considerable proportion.

We believe that the admission by the defendant that he sold fermented malt liquor containing alcohol constituted the admission of an offense under this statute, and consequently that the further proof offered by him and rejected was immaterial.

By the Court.—Judgment affirmed.

WILL OF HYDE: DONOVAN, Respondent, vs. HYDE, Appellant.

September 14—December 7, 1909.

Appeal: Affirmative showing of error: Evidence received provisionally: Costs: Discretion.

1. Where the record shows that upon a trial by the court certain testimony was received *de bene esse*, and does not show that any part thereof which was claimed to be inadmissible was considered by the court, no error affirmatively appears.
2. In a will contest an award of costs against the contestant in the circuit court will not be disturbed on appeal unless there was an abuse of discretion.

APPEAL from a judgment of the circuit court for Juneau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Appeal by one *Thomas F. Hyde* from judgment of the circuit court affirming order of the county court admitting to probate a certain writing as the will of Thomas J. Hyde, deceased. According to the evidence of the proponent the will was drawn for Hyde by a layman while the former was in his last sickness, but able to sit up in bed. It was drawn in lead pencil, executed by testator by his mark, and then taken by the scrivener through an open door to a table in an adjoining room, where the name of the testator was written by the scrivener and the names of the attesting witnesses were affixed; it being announced and fully understood that the paper was so executed as the will of the deceased and that he desired the witnesses to complete its formal execution. The principal controversy on the appeal is whether the evidence permits the conclusion that the table on which the witnesses wrote their names was so situated as to be within the observation of the testator. The court found that such attestation was in the presence of the testator.

For the appellant there was a brief by *Lenicheck, Fairchild & Boesel,* attorneys, and *Daniel H. Grady,* of counsel, and oral argument by *Mr. E. T. Fairchild* and *Mr. Grady.*

For the respondent there was a brief by *Veeder & Veeder,* and oral argument by *F. S. Veeder.*

The following opinion was filed October 5, 1909:

DODGE, J. The principal question presented is a pure issue of fact on which the circuit court has reached a conclusion. We do not feel justified in saying more about the evidence than that we fail to find any clear preponderance against such conclusion.

Error is assigned, and some argument indulged, upon admission of testimony of the scrivener to personal transactions with the deceased, objectionable by reason of asserted interest under the will; but the record discloses that such testimony was received merely *de bene esse,* and does not show that any part thereof relating to personal transactions was considered by the court. Hence no error affirmatively appears in that respect.

Another assignment of error is in the award of costs against the contestant in circuit court. The circuit court was in better position than we can be to weigh any considerations for or against such award and to exercise sound discretion thereon. We cannot find anything in the record to persuade us that that discretion has been abused.

By the Court.—Judgment affirmed.

WINSLOW, C. J., took no part.

Upon a motion by the appellant the mandate was, on December 7, 1909, modified and amended so as to direct that the taxable costs of both parties be paid out of the estate, but that no costs be taxed for printing the case.

BAKALARS, Respondent, vs. CONTINENTAL CASUALTY COMPANY, Appellant.

September 15—December 7, 1909.

Accident insurance: "Voluntary exposure to unnecessary danger:" Burden of proof: Sufficiency of evidence: Construction of policy: Ambiguities: "Influence of any intoxicant:" Instructions to jury.

1. In order that the death of an insured should have resulted from "voluntary exposure to unnecessary danger or obvious risk of injury," within the meaning of a condition in an accident policy reducing the amount payable in such case, there must have been conscious knowledge of the danger and intentional or wilful exposure to it.
2. In an action upon such a policy the burden is upon the insurer to prove such voluntary exposure to danger by evidence from which the fact can reasonably be inferred, not merely conjectured or guessed.
3. Evidence that a locomotive fireman took the usual and shortest route from his home through the railroad yard to his place of employment at the roundhouse, and that his injuries indicated that he had been struck and run over by a passing engine, was insufficient to show either that he knew of the danger from which he suffered or that he wilfully or intentionally exposed himself to it.
4. In case of ambiguity the words of an insurance policy are to be construed most favorably to the insured.
5. In an accident policy providing for a reduction in the amount payable in case the injury is "sustained while the insured is insane, delirious, or under the influence of any intoxicant or narcotic," the phrase "influence of any intoxicant" means such kind and degree of influence as impairs his ability to care for himself and thus increases the probability of injury. It is equivalent to the word "intoxication."
6. Requested instructions assuming the existence of a fact in dispute are properly refused.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action on policy for accidental death of John Bakalars on December 7, 1905, whose body was found shortly after 1

o'clock in the morning beside a railroad track. Death by one of the causes insured against was not contested, but the defendant set up, first, that it occurred from "the voluntary exposure of said Bakalars to unnecessary danger and obvious risk and injury," and, second, while said Bakalars was "under the influence of intoxicating liquors," in each of which cases the policy provided that only one tenth of the face thereof should be paid. This amount was tendered. The court submitted but one question to the jury, namely, whether Bakalars at the time he sustained the actual injury was under the influence of any intoxicant, which was answered in the negative. Whereupon judgment for the face of the policy was rendered, from which the defendant appeals.

For the appellant there was a brief by *Jesse E. Higbee*, attorney, and *Manton Maverick*, of counsel, and oral argument by *Mr. Higbee*.

For the respondent there was a brief by *W. F. & A. C. Wolfe*, and oral argument by *W. F. Wolfe*.

The following opinion was filed October 5, 1909:

DODGE, J. 1. The first error assigned is upon refusal to submit to the jury the question whether the injury resulted "from voluntary exposure to unnecessary danger or obvious risk of injury." According to the great weight of authority three elements are essential to this excuse from liability: (a) Conscious knowledge of the danger; (b) intentional or wilful exposure to it; and (c) that the danger shall be unnecessary. As to the first two elements, this court has declared itself in accord with such authority in *Schneider v. Providence L. Ins. Co.* 24 Wis. 28; *Shevlin v. Am. Mut. Acc. Asso.* 94 Wis. 180, 68 N. W. 866; and in *Sargent v. Central Acc. Ins. Co.* 112 Wis. 29, 87 N. W. 796. The only evidence upon which the court or jury could act was that the deceased was a locomotive fireman insured as such, whose duties of course took him about the tracks in railroad yards, and that on the

occasion in question he took an entirely usual route, and the shortest one, from his home to his place of employment at the roundhouse through the railroad yard and in the vicinity of tracks, and that his injuries indicated that he had been struck and run over by a passing engine. In the absence of any other evidence, we agree with the trial court that a conclusion either that he knew of the danger from which he suffered, or that he wilfully and intentionally exposed himself to it, could have been based only on conjecture or guess. The burden of proof was upon the defendant to offer evidence from which such conclusion might result by reasonable inference and not alone by conjecture. *Follis v. U. S. Mut. Acc. Asso.* 94 Iowa, 435, 62 N. W. 807; *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36; *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Schell v. C. & N. W. R. Co.* 134 Wis. 142, 113 N. W. 657. The trial court did not err in holding that no such evidence had been introduced, and therefore an affirmative answer to such question could not have been sustained.

2. A second error is assigned upon the refusal of the court to direct verdict that the deceased at the time of his injury was under the influence of intoxicating liquor, which fact it is claimed was established without dispute. We cannot at all agree with this view of appellant's counsel. The evidence of any considerable use of intoxicating liquor, or influence thereof upon deceased even at any time during the evening before his death, is very conflicting; but, even if a condition of some degree of intoxication had existed, there was evidence tending to show that the last use of liquor was prior to 10 o'clock; that an hour or more of slumber succeeded it, and that as early as an hour before the casualty, on awakening from that slumber, deceased had fully recovered all his faculties and was free from any apparent influence of previous potations. We agree with the trial court that there was plenary evidence on which the jury might have based a negative answer to the question submitted to them.

3. Error is assigned upon instructions substantially to the effect that the phrase in the policy "under the influence of any intoxicant" meant not every and any influence however slight, but such degree of influence as would materially impair the deceased's ability to care for himself and guard against casualties, and that such degree of influence was equivalent to intoxication in the ordinary meaning of that word; that the jury should not answer the question in the affirmative unless they found that he was "intoxicated" or "drunk." The entire phrase of the policy in which these words occur is, "where the accidental injury is sustained while the insured is insane, delirious, or under the influence of any intoxicant or narcotic." The rule, of course, is thoroughly established that in case of ambiguity the words of an insurance policy are to be read most favorably to the insured. Here the intimate association of the words "under the influence of intoxicants" with the words "insane or delirious" at once suggests that the influence of intoxicants intended to be described has some similarity in character with insanity or delirium. Again, it must be presumed that this provision is included in the policy for some practical purpose, and that therefore it is intended to describe a condition which at least might enhance or affect the insurer's liability. The "influence of intoxicants" is a very elastic term. We are told by physicians and experimenters that the most trifling quantity of alcohol has some effect, and that its effect persists for days, if not permanently, so that one is literally under the influence from a single ordinary portion. We know as a matter of common knowledge that one of the first influences may be to stimulate those very faculties of observation and alertness which would improve the capacity of the subject to shield himself from danger, or escape, and that some such degree of influence of an intoxicant would not in any respect increase the peril of injury. It is therefore a natural and almost necessary assumption that these words were not inserted in the

policy for the purpose of depriving the assured of the benefit thereof in case of every and any influence of intoxicating liquors, however slight and however nonprejudicial to the insurer. The field, therefore, is open for construction to ascertain just what degree or kind of influence is referred to. As already said, we must presume that it means such and so much influence as impairs the ability of the subject to care for himself and thus increases the probability of his suffering accidental injury. In light of such reasoning it has been decided by all courts speaking upon the subject that influence of intoxicants in accident policies means the same thing as the word "intoxication." 3 Joyce, Ins. § 2612; *Standard L. & Acc. Ins. Co. v. Jones,* 94 Ala. 434, 10 South. 530; *Campbell v. Fidelity & Cas. Co.* 109 Ky. 661, 60 S. W. 492; *Jones v. U. S. Mut. Acc. Asso.* 92 Iowa, 652, 654, 61 N. W. 485; *Prader v. Nat. M. Acc. Asso.* 95 Iowa, 149, 63 N. W. 601. In this field of indefiniteness it is important that some exact line should be adopted by which the rights of parties are rendered certain, and, in absence of any cogent reasons to the contrary, we deem it wise and justifiable to adopt this line of demarcation which has been approved by express decision of other courts; especially since such decisions preceded the date of this contract and may reasonably be presumed to have been in mind when its phraseology was adopted. We conclude that the instruction was substantially correct.

4. Refusal of certain requested instructions is assigned as error. They assumed a state of intoxication at some time during the evening prior to the death of insured. Since, as we have said, this fact was in dispute, the requests were improper in form and no error was involved in their refusal.

By the Court.—Judgment affirmed.

WINSLOW, C. J., took no part.

A motion for a rehearing was denied December 7, 1909.

PECK, Respondent, vs. CITY OF BARABOO, Appellant.

September 16—December 7, 1909.

(1-3) *Special verdict: Negligence: Proximate cause: Liberal construction.* (4, 5) *Municipal corporations: Sewers: Surface water: Injury to lands.* (6) *Costs: Printing: Disregard of court rules.*

1. A special verdict finding that in each of two separate acts or omissions there was a want of ordinary care on the part of defendant, and further finding, without specific reference to either, that "such want of ordinary care" was the proximate cause of plaintiff's injury, is insufficient if one of such acts or omissions was not actionable.
2. The words of a special verdict should be liberally construed with a view to supporting it.
3. Want of ordinary care in "adopting" a plan for a sewer, found by a special verdict, is construed to mean want of such care in selecting the plan and in examining and passing upon its sufficiency, or in failing to examine and pass upon its sufficiency, or in constructing a sewer or series of sewers without any definite plan, and not merely in voting upon a resolution of adoption.
4. If a city first collect surface water in a sewer or drain and thereafter, by reason of negligent construction or maintenance of the sewer or drain, allow the water so collected to escape upon adjacent land, it will be liable for the damage caused thereby.
5. But a city cannot be held in damages by the landowner for changing the natural flow and increasing the volume of surface water on his premises by the construction of streets and gutters, nor because a sewer was inadequate, either by reason of negligence in adopting plans in the first place or by reason of negligent failure to maintain the sewer in good working order thereafter, to carry off the surface water as fast as it accumulated.
6. Costs are disallowed for printing a case and brief in which Supreme Court Rules 9-12 were disregarded.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

For the appellant there was a brief by *John M. Kelley,* attorney, and *F. R. Bentley,* of counsel, and oral argument by *Mr. Kelley.*

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

The following opinion was filed October 5, 1909:

TIMLIN, J. In the circuit court the respondent presented a complaint charging the appellant with negligence in the adoption of a plan for a sewer or system of sewerage which was partly upon the street in front of respondent's property, also negligence in failing to adopt any plan for the same, also negligence in maintaining such sewer; and averred that, in consequence of such negligence, the respondent was damaged by a flow of surface water on his premises on May 22, 1907, which water the sewer so negligently constructed and maintained failed to carry off after a heavy rainfall. The jury, after hearing the evidence, arguments, and instructions, returned a special verdict as follows:

"(1) Did the defendant use ordinary care in adopting the plan for the Barker street sewer? *A.* No.

"(2) Did the defendant use ordinary care in maintaining such sewer? *A.* No.

"(3) Was the rain of May 22, 1907, an extraordinary rain? *A.* No.

"(4) If you answer 'No' to either question No. 1 or question No. 2, was such want of ordinary care the proximate cause of the injury sustained by plaintiff May 22, 1907? *A.* Yes.

"(5) Did the sewer in front of plaintiff's property on May 22, 1907, carry anything but surface water? *A.* Yes."

The respondent's damages were assessed by the jury at $370. Respondent moved for judgment in his favor upon this verdict, and the learned trial judge added a conclusion from the evidence, or a finding, that the land and streets adjacent to respondent's property had been so graded as to increase the flow of surface water down to and upon such property, and ordered judgment in favor of respondent.

It will be noticed that there is no averment in the pleading, and no finding by the jury, that the water was first collected by the city in the sewer and then escaped upon respondent's

land, nor were the waters backed up upon the respondent's land after having been taken into the sewer by reason of defects in the construction or maintenance of the sewer, nor were respondent's premises connected with the sewer. The verdict, taken with the complaint, merely affirms that after a heavy, but not an extraordinary, fall of rain the premises of the respondent were injured—*i. e.* damaged—from the action of surface water covering the same, which surface water the sewers in question failed to carry off as it fell in rain. (The fifth finding of the jury is too indefinite, and, assuming its verity, it establishes nothing material.) The city did not use ordinary care in adopting a plan for a designated sewer which we will assume to include the sewer in question adjoining respondent's premises. The city did not use ordinary care in maintaining this sewer. One of these two lapses was the proximate cause of the injury to respondent, which means the damage to his property; but which alleged breach of duty caused the damage is not found. No doubt such a special verdict would be quite sufficient in form if the first question as answered, and the second question as answered, each established an invasion of respondent's legal rights, a breach of legal duty owing from the appellant to the respondent, or in case one of the questions was answered in the affirmative and one in the negative, and that answered in the negative established such breach of duty. But in case both are answered in the negative. and either fails to set forth an actionable wrong, or neither of the first two questions of the verdict sets forth an actionable wrong, that is to say, a breach of legal duty due from appellant to respondent, it must be obvious that the jury have failed to find affirmatively that the damages suffered by the respondent were caused by any wrong or delict on the part of appellant. This would be a fatal defect. This form of special verdict is disapproved because it is at best only contingently good. That is, sufficient upon the contingency of the jury answering both the first and second ques-

tions in the negative, that both are supported by evidence, and that each as answered constitutes a delict for which defendant is answerable to the plaintiff; or in the contingency that one is answered in the affirmative and the other in the negative, and the latter finds the defendant guilty of an actionable wrong.

We think the words of the special verdict should receive, with a view to support the verdict, great liberality of construction, and we therefore assume that want of ordinary care in adopting a plan means want of such care in selecting the plan and in examining and passing upon its sufficiency, or in failing to examine and pass upon its sufficiency, or in constructing a sewer or series of sewers without any definite plan, although the narrower meaning of adopting by merely voting upon a resolution might be urged.

Inquiring into the legal duty due from a city to a lotowner with reference to the construction of sewers, we find it noted (10 Am. & Eng. Ency. of Law, 2d ed. 239) that the decisions of the courts on this subject are by no means harmonious. The same comment is made at Id. 249, with reference to the liability of a municipal corporation for damages to private property caused by surface water. Whenever this condition of discord is found among the precedents, it is advisable to confine ourselves to the law of this state, so that the interstate discord may not become local and internecine. Carelessly and negligently constructing streets lying to the north and west of certain land by reason of which large quantities of surface water which would otherwise have passed off in other directions were conducted through the drains or gutters of such streets and cast in a body on his land, and at the same time raising the grade of a street to the south or southwest of his land so as to retain on the land the waters thus cast upon it, was held to confer no right of action in favor of the owner of the land and against the city doing these acts. *Harp v. Baraboo,* 101 Wis. 368, 77 N. W. 744. It will be observed

that this case confirms the right of the city by construction and grading of streets to change the flow of surface water so as to bring down upon a lotowner from new watersheds surface water which would not, but for such street grading, have taken that course or reached his lot. In *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, 82 N. W. 146, the railroad company by a ditch on its right of way parallel with its track carried surface water, which would otherwise never have reached the plaintiff's land, out of its natural and usual course and direction, and cast it upon the land of the plaintiff. This ditch was necessary to the use and enjoyment of the defendant's property, and the act was held *damnum absque injuria.* In *Heth v. Fond du Lac,* 63 Wis. 228, 23 N. W. 495, the city in the construction and grading of streets so changed the course and flow of surface water as to bring an increased flow in the drain leading towards plaintiff's land and cast upon plaintiff's land large quantities of surface water, part of which but for this drain would never have reached plaintiff's land, but would have passed off in a different direction. It was held that the city was not liable. In *Champion v. Crandon,* 84 Wis. 405, 54 N. W. 775, it was ruled that in the construction and draining of streets the town might change the natural flow of surface water on the streets so as to bring to the plaintiff's land surface water which would not naturally flow there, and that neither a defective plan nor negligence in the doing of such work would support the liability of the town. But the city is not without liability in a proper case for the negligent construction or maintenance of a sewer. If the city first collect surface water in a sewer or drain and thereafter, by reason of negligent construction or maintenance of the sewer or drain, allow it to escape upon land adjacent to the sewer, the city will be liable for the damage caused thereby. *Schroeder v. Baraboo,* 93 Wis. 95, 67 N. W. 27; *Hart v. Neillsville,* 125 Wis. 546, 104 N. W. 699. This is the distinguishing point in *Gilluly v. Madison,* 63

Wis. 518, 24 N. W. 137. It will be noticed that in the case last cited, although it is stated in the opinion that the surface water was collected from other sources than the street and otherwise would not have run to plaintiff's lot, there was present the fact of collecting these waters in the ditch or drain and leading them to a point therein in proximity to plaintiff's lot, where, by reason of the negligently defective condition of the drain, they were discharged upon plaintiff's lot. In view of other cases in this court, that must be considered the turning point in *Gilluly v. Madison, supra.*

A municipality, after it has made provision by a drain or sewer for carrying off surface water, may discontinue or abandon the drain or sewer if the landowners are thereby left in no worse condition with reference to the surface water set back than if the sewer had never been constructed. *Waters v. Bay View,* 61 Wis. 642, 21 N. W. 811. If the municipality may omit this intentionally, it may omit it negligently without incurring any liability. This does not apply generally to acts done as it does to acts omitted. This last case negatives the existence of a right of action by the lotowner against the city on account of damages from surface water set back upon the lot, which water the sewers of the city were insufficient to carry off by reason of lack of capacity for that purpose or by reason of the clogging or discontinuance of the sewer. This probably would not apply to the extent stated to injuries arising from sewage or other agencies than surface water and caused by the negligently defective condition of the sewer; but it is quite remarkable in this connection that in *Folk v. Milwaukee,* 108 Wis. 359, 84 N. W. 420, it was ruled that the city was not liable for the death of a pupil in a public school caused by sewer gas escaping into the school building from a sewer which the city had knowingly and negligently allowed to become clogged up and out of repair.

The common law recognizes some distinction between the right of a landowner to repel the inflow of surface water upon

his land and his right to relieve his land of surface water accumulating thereon from snow or rain or descending upon his land from higher levels. The case of *Lessard v. Stram,* 62 Wis. 112, 22 N. W. 284, is here worthy of notice because there the town dammed against surface water and thereby threw it out of its natural course onto the land of the defendants. The latter dammed against this surface water so attempted to be thrown upon their land and thereby threw the surface water again out of its natural course and upon the lands of plaintiff, to his damage. It was ruled that this right to repel surface water existed, not only against the upper proprietor, but generally. *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 641, 50 N. W. 771, also recognizes the right of the railroad company to repel surface water from its right of way, although the exercise of this right resulted in casting the surface water out of its natural course and upon the land of another.

Among the rules of law relating to surface water the following, quoted with approval in *Shaw v. Ward,* 131 Wis. 646, 111 N. W. 671, and in other cases in this court, is essentially paramount:

"The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water which may accumulate thereon by rains and snows falling on its surface or flowing onto it over the surface of adjacent lots either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow." See, also, *Manteufel v. Wetzel,* 133 Wis. 619, 114 N. W. 91.

It has been declared to be the law of this state in *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, 82 N. W. 146, and in

other cases there cited, that a municipal corporation, in the improvement of its streets by paving, grading, and guttering, has the same right to obstruct and divert the existing flow of mere surface water that an individual owner has in the improvement of his land, and that a railroad corporation has the like right. While this is no doubt correct as a proposition of law, there is an essential distinction of fact between the uses necessary to make a street or a railway right of way available for street or railway purposes and the improvements necessary to make agricultural or other land available for the purposes for which such land is adapted. In constructing or leveling a street or railroad, different watersheds carrying surface water in various directions may necessarily be intercepted in the extension of the street or railroad, and, as we have seen, the surface water from each may be carried along in the direction of the street or railroad and discharged at some low point, subject only to those legal rules which regulate the *manner of exercising* conceded legal rights generically represented in the maxim: *Sic utere tuo ut alienum non lædas.* This interception and change of different watersheds can rarely be necessary to the enjoyment and use of agricultural lands, and in view of the limitation expressed in *Manteufel v. Wetzel,* 133 Wis. 619, 114 N. W. 91, and the great number of cases collected in note 2, p. 337, and note 7, p. 335, 30 Am. & Eng. Ency. of Law (2d ed.), bearing on this subject, and in view of some suggested distinction in *Wendlandt v. Cavanaugh,* 85 Wis. 256, 55 N. W. 408, and again in *Schuster v. Albrecht,* 98 Wis. 241, 73 N. W. 990, between the acts of private owners in this respect and those of municipal corporations, and because the extent of the right of a private owner in this respect is not necessarily involved in this case, it seems best to express no opinion thereupon.

The instant case presents upon the pleadings, verdict, and finding no question of liability for discharging upon the land of the respondent surface water accumulated in a pond or res-

ervoir, nor of allowing surface water to escape from a negligently defective sewer after the corporation has taken the water into the sewer and assumed the carrying of it to the place of discharge. On the contrary, there is no liability shown, because in line with the cases herein cited a municipal corporation cannot be held in damages by a landowner for changing the natural flow of and increasing the volume of surface water by the construction of streets and gutters, nor because the sewer was inadequate by reason of negligence in adopting plans in the first place, or by reason of negligently failing to maintain the sewer in good working order thereafter, to carry off the surface water so accumulating as fast as it accumulated.

The printed case presented by appellant does not contain a fair statement of the evidence. The brief contains no assignments of error. It contains numerous propositions of fact averred to be in evidence without any reference to the printed case or the record to show upon what such propositions are based. It contains no adequate statement of the nature of the action nor of the issues involved, nor of the leading facts and conclusions which the evidence tends to establish. In short, Rules 9, 10, 11, and 12 of this court have been flagrantly disregarded. Therefore no costs will be allowed to be recovered by appellant for the expense of printing the case or brief.

By the Court.—The judgment of the circuit court is reversed, with costs in favor of appellant, except the expense of printing case and brief, which is disallowed, and the cause is remanded with directions to render judgment for defendant.

WINSLOW, C. J., took no part.

A motion for a rehearing was denied December 7, 1909.

LAUSON, Respondent, vs. TOWN OF FOND DU LAC, Appellant.

November 12—December 7, 1909.

Highways: Injuries to travelers: Automobiles: Negligence of driver: Imputed negligence: Lights.

1. **An occupant of a private automobile cannot recover for an injury caused by a defect in the highway if the negligence of the driver contributed to the accident.**
2. **The driver of an automobile who, while traveling on a dark, rainy night over a straight stretch of strange country road, drives his machine at such a rate of speed that he cannot bring it to a standstill within the distance that he can plainly see objects or obstructions ahead of him, is not exercising ordinary care.**
3. **Independent of any statute, it is negligence to run an automobile on a highway at night without sufficient lights to enable the driver to see objects ahead of him in time to avoid them.**
4. **The lights which, under sec. 1636—52, Stats. (Supp. 1906), are to be displayed on an automobile driven on a highway at night are not required solely for the protection of travelers other than those in the automobile.**
5. **The rule that it is not negligence to drive horses over a highway on a dark night without lights should not be extended to automobiles.**

APPEAL from a judgment of the circuit court for Fond du Lac county: E. RAY STEVENS, Judge. *Reversed.*

Action to recover damages for injuries alleged to have been sustained by reason of a defect in a highway. The plaintiff was riding in an automobile driven by one Robert Hippe, on the main highway between the cities of Waupun and Fond du Lac. A culvert in the road was being replaced, leaving an opening therein about eight feet in width and nine feet in depth. Barriers were erected on either side of the opening, such barriers consisting of a single sixteen-foot fence board extending across the highway and nailed to posts on either side. There was some dispute in the testimony as to the distance the barriers were placed from the opening; the testimony of the plaintiff tending to show that it was but twenty-

four feet distant, while that of the defendant tended to show that it was forty-three feet. The accident occurred about 10 o'clock on a dark, rainy night. The automobile ran through the barrier and into the opening, injuring the plaintiff. It was running at a speed not to exceed eight miles an hour. It carried but one headlight, which was tilted down somewhat so as to throw the light into the wheel tracks. From the testimony it appears that the driver could not see objects more than ten or twelve feet ahead of him, and that at the speed he was proceeding he could not bring the machine to a standstill within less than fifteen or twenty feet. The barriers were about four feet above the surface of the road. The alleged negligence of the town consisted in its failure to place a light around the opening or to afford any protection to travelers except such as might be afforded by the barriers that were erected. From a verdict and judgment in favor of the plaintiff defendant brings this appeal.

Maurice McKenna, for the appellant.

J. E. McMullen, for the respondent, to the point that the purpose of the requirement that an automobile running in the dark shall have a headlight burning is solely to give warning to others approaching in the opposite direction, cited *Wright v. Crane,* 142 Mich. 508, 106 N. W. 71; *Cook v. Fogarty,* 103 Iowa, 500, 72 N. W. 677; *McFern v. Gardner,* 121 Mo. App. 1, 97 S. W. 972; *Bennett v. Busch,* 75 N. J. Law, 240, 67 Atl. 188.

BARNES, J. The defendant seeks to defeat recovery on the ground that the driver of the automobile was guilty of contributory negligence, and that the court should have so decided as a matter of law. The automobile in question was a private conveyance, and if its driver failed to exercise ordinary care, and such failure contributed to produce the injury complained of, the plaintiff cannot recover. *Ritger v. Milwaukee,* 99 Wis. 190, 74 N. W. 815; *Prideaux v. Mineral*

Point, 43 Wis. 513; *Otis v. Janesville*, 47 Wis. 422, 2 N. W. 783; *Olson v. Luck*, 103 Wis. 33, 79 N. W. 29; *Lightfoot v. Winnebago T. Co.* 123 Wis. 479, 102 N. W. 30. The question for this court to solve is whether the driver of an automobile, who on a dark, rainy night is traveling over a straight stretch of strange country road, is exercising ordinary care if he drives his machine at such a rate of speed that he is unable to stop within a distance that is within the clear range of his vision. Stated in another way, if he can see objects but ten feet ahead, while he cannot stop his car in less than twenty feet, is he using ordinary care? If not, and injury results from his negligent act, neither he nor his passengers, if the conveyance be a private one, can recover damages for such injury.

Self-propelling machines of great weight and high power have come into general use in the past few years. They are rightfully accorded the same privileges in the use of our highways that are accorded to other vehicles. When driven at a reckless rate of speed they are a source of constant menace to their occupants and to the traveling public, which has not and cannot abdicate its right to use our roads. What may be a moderate rate of speed under some circumstances may be a reckless rate under other conditions.

The driver of every automobile in a city knows that streets are frequently torn up for the purpose of repairing or rebuilding them, and for the purpose of laying water and sewer pipes and for laying gas mains, conduits for carrying electric wires, and such like, and that repairs on such pipes, mains, and conduits must be frequently made, as well as connections with private consumers. He further knows that children, pedestrians, bicycle and motorcycle riders, street cars, and passengers carried by horse power are to be found on the streets in great numbers and frequently huddled closely together. The driver on a country road knows that bridges and culverts must be rebuilt; that highways must be repaired; that wash-

outs occasionally occur; that live stock roam about the roads unattended; that travelers on foot, on horseback, and in various kinds of vehicles are found using the highways at all seasons of the year and at all times of the day and night. Such a driver has no right to expect and does not expect a free and unobstructed right of way over a well-defined track, as does the engineer of a locomotive or even the motorman of an electric car.

The automobile has created a new peril in the use of our public highways; a peril that unfortunately has been greatly enhanced by the recklessness of drivers who propel such machines with the speed of railway trains along crowded thoroughfares. Some rule consonant with the public safety, and not unduly harsh or restrictive upon the users of motor cars, must be evolved to meet a situation which has recently arisen. No case presenting a similar state of facts has been cited by counsel.

It seems to us, and we decide, that the driver of an automobile, circumstanced as was the driver of the car in which the plaintiff was riding, and operating it under such conditions as he operated his machine on the night of the accident, is not exercising ordinary care if he is driving the car at such a rate of speed that he cannot bring it to a standstill within the distance that he can plainly see objects or obstructions ahead of him. If his light be such that he can see objects for only a distance of ten feet, then he should so regulate his speed as to be able to stop his machine within that distance. and if he fails to do so, and an accident results from such failure, no recovery can be had. This, it seems to us, is the minimum degree of care that should be required. Circumstances might arise where it would be reckless to drive at such a rate of speed, or even at a rate approximating it. We do not ground this rule on the fact that we have a statute requiring automobiles to carry reasonably bright lights while being operated during the hours of darkness. Independent of any

statute, and considering the character of these machines, we hold it would be negligent operation to run them without sufficient lights to enable the driver to see objects ahead of him in time to avoid them. Such is substantially the rule adopted by the supreme court of Connecticut in a well-considered case in reference to the running of a street car. The court said:

"When running at night, it must be provided with such means of illumination as may be requisite, in connection with the light, if any, to be expected from other sources, to enable the motorman to see far enough ahead to do whatever ordinary care may demand in order to avoid a rear-end collision with any other vehicle upon the railway track. The speed with which any vehicle can be driven over a highway at night must be determined partly in view of the distance ahead at which travelers upon or approaching the same highway would become visible." *Currie v. Consolidated R. Co.* 81 Conn. 383, 71 Atl. 356.

We perceive no reason why an automobile should not be driven with the same degree of care required in the case of a street car, and there are many reasons why a greater degree of care should be required.

Nor can we countenance the proposition urged upon us that lights are required only for the protection of travelers other than those riding in the automobile. It is true that the evidence in this case showed that a party traveling in an opposite direction from that in which the automobile was proceeding could see the light plainly a quarter of a mile distant and in ample time to leave the traveled track. But this testimony does not prove anything of value. The other traveler is not obliged to yield the entire track, and the nature of the road might well be such that he could not do so, and, if he did, a slight swerving of the machine to avoid a rut or a stone might result in a collision. Perhaps almost as many persons, and vehicles drawn by horses, are overtaken and passed by automobiles as are met, and, as to such, a dim light might afford no protection whatever, or at least not sufficient warning to

avoid a collision, if they were compelled to rely on what they could see to avoid it.

Our attention is called to cases in this court which hold that it is not negligence to drive horses over a highway on a dark night without lights. *Milwaukee v. Davis,* 6 Wis. 377; *Hart v. Red Cedar,* 63 Wis. 634, 24 N. W. 410; *Brennan v. Friendship,* 67 Wis. 223, 29 N. W. 902; and *Bills v. Kaukauna,* 94 Wis. 310, 68 N. W. 992, are cases in which the rule of law is so declared. The doctrine of those cases should not be extended to automobiles. A team of horses, if permitted to do so, will ordinarily follow the traveled track, even where it is so dark that their driver may be wholly unable to distinguish it. Under such circumstances an automobile could hardly be run a rod without running into a ditch, except by sheer good luck. A horse will ordinarily stop when a barrier is reached. The machine tries conclusions with it, and brushes it aside if not strong enough to resist the momentum hurled against it. Driving an automobile over a country road on a dark, rainy night without light would indicate a well-defined intent on the part of the driver to commit suicide, rather than the exercise of ordinary care.

The court should have changed the answer to the third question in the special verdict from "No" to "Yes," and rendered judgment on the verdict as so modified in favor of the defendant.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to modify the verdict as above indicated, and to render judgment dismissing the complaint on the verdict as modified.

NATIONAL KNITTING COMPANY, Respondent, vs. BOUTON & GERMAIN COMPANY, Appellant.

November 12—December 7, 1909.

Contracts: Entirety: Intention: Sales.

A contract for the sale of goods—in this case a quantity of gloves of different kinds at fixed prices—which is naturally severable will not be held entire, in the absence of express or implied provision to that effect therein, or persuasive circumstances showing intention of the parties to make it entire.

APPEAL from a judgment of the municipal court of the city and town of Ripon: J. J. FOOTE, Judge. *Affirmed.*

The plaintiff corporation is a manufacturer and dealer in knitted goods at Milwaukee, and the defendant corporation is a jobber in the same line of goods at Ripon. In November, 1905, the defendant ordered of the plaintiff, in writing, a quantity of gloves of different kinds at fixed prices, aggregating $322.86, delivery to be made in the following May, bill to be dated as of November 1, 1906, payable in thirty days. The order was accepted, and in April the plaintiff delivered the greater part of the goods ordered, but never delivered one item of eighteen dozen gloves and another item of six dozen gloves. The plaintiff sues to recover for the goods actually delivered at contract prices. The defendant contends that the contract is entire, and hence that nothing is due, because the contract has never been fully performed. The defendant also sets up a counterclaim for damages because of nondelivery of said two items, in case the court should hold the contract to be severable. The trial court held the contract to be severable, and awarded judgment for the plaintiff for the contract price of the items delivered, less damages, consisting of the loss of profits on the items not delivered. From this judgment defendant appeals.

For the appellant there was a brief by *Carter & Pedrick*, and oral argument by *S. M. Pedrick*.

Leo Torbe, for the respondent.

WINSLOW, C. J. We think that the business world would be astonished to learn that whenever an order for a bill of merchandise is accepted the contract thus made is entire, and requires delivery of every article before there can be recovery of any part of the purchase price. Such would be the practical effect of the defendant's contention here, if it should be upheld. We cannot so hold. The question of entirety is a question of intention; severability of the subject matter and measurement of consideration by units may assist in determining, but do not of themselves necessarily determine the question.

In case of a contract naturally and accurately severable (such as a contract for the sale of a bill of goods at certain prices for each article), courts incline to hold the contract severable, and to grant a recovery for that portion of the goods actually delivered, less damages for the nondelivery of any portion not delivered. Under all ordinary circumstances this course will result in exact justice. The vendor will receive pay for his goods which the vendee has retained, and the vendee will receive compensation for any damage which he has actually suffered.

If, however, it appears by express terms or by necessary implication from the terms of a contract that the intention of the parties was to make payment of the consideration depend upon delivery of all the articles, the contract will be held entire, though the consideration may be measured in units and be actually severable. *Goodwin v. Merrill*, 13 Wis. 658; *Shinn v. Bodine*, 60 Pa. St. 182. Thus, when a contract required the delivery of 2,000 yards of crushed stone for the purpose of building a bridge, it was held to be entire, notwithstanding the payment was to be at a certain rate per yard.

Prautsch v. Rasmussen, 133 Wis. 181, 113 N. W. 416. So contracts to tow a given quantity of logs at so much per thousand feet, and to carry 5,000 barrels of salt at so much per barrel, have been held entire, upon the idea that the terms of the contract, in the light of the surrounding facts, showed that the parties evidently intended to contract for one entire job, and only used the unit of measurement of the consideration for convenience and not as indicating any contemplation of severability. *Boutin v. Lindsley,* 84 Wis. 644, 54 N. W. 1017; *Warehouse & B. S. Co. v. Galvin,* 96 Wis. 523, 71 N. W. 804. See, also, *Widman v. Gay,* 104 Wis. 277, 80 N. W. 450.

The principle here decided is that contracts for the sale of goods like the present, which are naturally severable, will not be held entire contracts, in the absence of express or implied provision to that effect in the contract, or persuasive circumstances showing the intention of the parties to make it entire.

By the Court.—Judgment affirmed.

RIPON HARDWARE COMPANY, Respondent, vs. HAAS, Administrator, imp., Appellant.

SAME, Appellant, vs. SAME, Respondent.

November 12—December 7, 1909.

Evidence: Presumptions: Signatures: Guaranty on note: Instructions to jury: New trial: Appeal: Review: Appealable order.

1. The rule in sec. 4193, Stats. (1898), that in an action brought upon a promissory note by the indorsee the possession of the note is *prima facie* evidence that it was indorsed by the persons by whom it purports to be indorsed, does not apply to a guaranty indorsed on the note.
2. Where, by reason of the death of the person by whom an instrument purports to be signed, sec. 4192, Stats. (1898), is inapplicable, common-law proof of the execution is necessary.

3. Where the signature to a contract which is in all respects regular on its face is admitted or proved, the presumption arises that the writing was, when signed, in the form in which it appears at the time of its production in a proceeding to enforce it, and such presumption should prevail until overcome by clear and satisfactory evidence.
4. The issue being as to whether a guaranty was indorsed upon a note before or after the signature of one of the alleged guarantors was written, and such signature being admitted or proved, it was error not to instruct the jury, upon proper request, as to the presumption arising from production of the instrument in evidence with no indication of any irregularity or alteration appearing thereon.
5. In reviewing a decision granting a new trial for error in not charging the jury upon a point as to which an instruction was requested, the request and the decision should be viewed in the light of the evidence, and an established fact may be considered as having been incorporated, by way of qualification, in the requested instruction.
6. An order merely denying a motion for judgment notwithstanding the verdict is not appealable.

APPEALS from an order of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to recover of the maker and guarantors of a promissory note.

The note was for $1,500, dated August 22, 1901, payable in one year after date, made by Charles H. Dodge to the order of Charles Cowan, and indorsed thus:

"For value received we hereby guaranty the payment of the within note at maturity or at any time thereafter, with interest at the rate of six per cent. per annum, until paid, waiving notice of nonpayment and protest.

"W. B. NASON.
"ED. KOPPLIN.
"JOHN HAAS."

It was alleged to have been, for value, so indorsed, delivered to the payee and thereafter, before the commencement of the action, for value, indorsed without recourse to the plaintiff. Haas answered and thereafter died. The action was re-

vived against his personal representative. The answer raised these questions:

(1) Did the deceased execute the guaranty? (2) Was there any consideration to support the note? (3) Was the note in fact paid before the commencement of the action?

The court decided all the facts alleged in the complaint to be established, conclusively, by the evidence, except that in relation to execution of the guaranty. A question on that was submitted to the jury, resulting in a finding that the guaranty was stamped on the back of the note over the signatures of the alleged guarantors, after Haas affixed his signature.

There was a motion, on behalf of plaintiff, for judgment notwithstanding the verdict, with an alternative motion for a new trial, and a motion in defendant's behalf for judgment on the verdict. The latter was denied. Plaintiff's motion for judgment was denied; but that for a new trial was granted, upon the ground that the court erred in not instructing the jury that the production of the note by plaintiff with the guaranty thereon, established a rebuttable presumption that it was there before being signed; in view of plaintiff's counsel having requested an instruction, as follows:

"The possession of the note is presumptive evidence that the same was indorsed and the guaranty made by W. B. Nason and Ed. Kopplin and John Haas in the manner and for the purposes it purports to be indorsed, and the burden of overcoming said presumption rests upon the defendant and said defendant must overthrow said presumption, if at all, by a clear preponderance of the evidence."

Both sides appealed.

For the plaintiff there were briefs by *Carter & Pedrick,* and oral argument by *S. M. Pedrick.*

For the defendant *Haas* there were briefs by *Morse & Williams,* and oral argument by *D. O. Williams.*

MARSHALL, J. The rule that production and possession of an indorsed promissory note proves, *prima facie,* that the in-

dorsement was made according to its purport, is statutory. Sec. 4193, Stats. (1898). It applies, only, to indorsements, and when the action to enforce the paper is by an indorsee. *Cook v. Helms,* 5 Wis. 107; *Roach v. Sanborn L. Co.* 135 Wis. 354, 115 N. W. 1102. As this action, so far as concerns plaintiff, is against a guarantor, such rule does not apply.

The only statutory presumption which could apply, under any circumstances, is the one contained in sec. 4192, Stats. (1898), providing that:

"Every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until the person by whom it purports to have been so signed or executed shall specifically deny the signature or execution of the same by his oath or affidavit or by his pleading duly verified. . . ."

Assuming, without deciding, that there was a sufficient denial in this case to satisfy the statute, it does not apply, the guarantor having deceased before the trial, since it contains this exception:

"But this section shall not extend to instruments purporting to have been signed or executed by any person who shall have died previous to the requirement of such proof."

It follows, from the foregoing, that common-law proof of the execution and contents of the guaranty was necessary. *Campion v. Schinnick,* 93 Wis. 111, 67 N. W. 11; *Deering H. Co. v. Johnson,* 108 Wis. 275, 84 N. W. 426.

Conclusive common-law proof of the signature was given. So the issue came down to whether, when the signing occurred, the guaranty was on the paper. That, properly, called on the common-law presumption that, when the signature to a contract which, in every respect, is regular on its face, is admitted or proved, the presumption arises that the writing was, when signed, in the form appearing at the time of its production in a proceeding to enforce it, and such presumption should prevail till overcome by clear and satisfactory evidence. *Maldaner v. Smith,* 102 Wis. 30, 78 N. W. 140. The requested instruction, in connection with the proved signing

of the paper, bearing on its face no suspicious earmarks, fairly covered such rule.

It is argued that the court granted the new trial because the request suggested a right rule without stating it correctly. We do not so understand the learned court's language. The judge said:

The verdict of the jury will be set aside and a new trial awarded "upon the sole ground that the court erred to the plaintiff's prejudice in not incorporating in the charge, in view of the request of plaintiff for an instruction relating to the subject, an instruction to the effect that upon the production of the note in evidence without any indications of irregularity in or alteration of the indorsement appearing thereon, the presumption obtained, subject to overthrow by proof, that the guaranty was stamped on the back of the note before or at the time the indorsers affixed their signatures."

If that language suggests that the request did not contain the qualification, it is certainly wrong. Such qualification was phrased, quite as accurately, in the request as in the decision. The learned judge, obviously, used the quoted language, in the whole, as descriptive of the request and to characterize it as proper.

We must view the request and the decision in the light of the evidence. Considered, in general, they were not strictly accurate. They become so when viewed in the light of the fact that the contract, fair on its face, signed by the party in whose name it was challenged, was established. That fact, as a verity, must be considered incorporated into the request, as it was by necessary inference.

In view of the foregoing, the order, so far as appealed from by defendant, must be affirmed.

The appeal of the plaintiff cannot be entertained. The order, so far as adverse to him, merely denied the application for judgment notwithstanding the verdict. That is, very plainly, not appealable.

By the Court.—The order as to defendant is affirmed, and plaintiff's appeal is dismissed.

FOND DU LAC CHEESE & BUTTER COMPANY, Respondent, vs. HENNINGSEN PRODUCE COMPANY, Appellant.

November 12—December 7, 1909.

Courts: Jurisdiction: Foreign corporations: Service on officer within this state: Due process of law.

1. Courts of this state cannot acquire jurisdiction over persons not present in the state, except for the purpose of adjudicating with reference to property or status here located.
2. A statute authorizing an action against a foreign corporation whenever the plaintiff resides in this state and the summons can be served upon some officer or agent of the corporation, is ineffective to confer jurisdiction unless the presence of such officer or agent within the state amounts to presence of the corporation.
3. Where the treasurer and manager of a foreign corporation was, at the time summons was served upon him, within the state negotiating for adjustment of the corporation's liability upon the claim sued on, and such matter was within his authority, his presence was the presence of the corporation within the state and jurisdiction was acquired by such service.
4. Service of summons in the manner authorized by subd. 13, sec. 2637, Stats. (1898), satisfies all requirements of due process of law.

APPEAL from an order of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Plaintiff, a Wisconsin corporation, sued defendant, a corporation of, and located in, Montana, and not engaged in business in Wisconsin, for a consignment of butter ordered from the plaintiff by mail and delivered free on board cars at Fond du Lac, Wisconsin. Service of summons was made upon A. P. Henningsen, treasurer and manager of defendant corporation, at Fond du Lac. Judgment was entered by default. Defendant thereafter appeared specially, and moved upon affidavits to set aside and declare null said judgment for the reason that no jurisdiction was acquired over the person of the defendant. Defendant's affidavit asserted that Henningsen was not in this state in connection with any business or in-

terests of the corporation, but merely as a visitor. Affidavits of the plaintiff asserted that at the moment of service he had come to Fond du Lac for the purpose of adjusting and settling the controversy between plaintiff and defendant as to the latter's liability forming the basis of this action. The court in an opinion expressed his conclusion from the affidavits that the cause of action arose within the state of Wisconsin, and that A. P. Henningsen, admittedly treasurer and manager of the defendant, was in this state for the purpose of adjusting. and was engaged in adjusting, said claim, and he was therefore in charge of and conducting the business of the corporation within this state. Accordingly order was entered denying the motion, from which order defendant appeals.

The cause was submitted for the appellant on the brief of *H. E. Swett,* and for the respondent on that of *T. L. Doyle.*

Counsel for the appellant cited *Fitzgerald & M. C. Co. v. Fitzgerald,* 137 U. S. 98; *Goldey v. Morning News,* 156 U. S. 518; *Conley v. Mathieson A. Works,* 190 U. S. 406; 13 Am. & Eng. Ency. of Law (2d ed.) 893; 19 Cyc. 1327, and cases cited to note 73; 12 Cent. Dig. § 2613 and cases; 3 Cook, Corp. § 759; Taylor, Priv. Corp. § 395; *Latimer v. Union Pac. R.* 43 Mo. 105, 97 Am. Dec. 378; *Phillips v. Library Co.* 141 Pa. St. 462, 21 Atl. 640, 27 Am. St. Rep. 304; *Clews v. Woodstock I. Co.* 44 Fed. 31; *Good Hope Co. v. Railway B. F. Co.* 22 Fed. 635; *Case v. Smith, Lineaweaver & Co.* 152 Fed. 730; *Ladd M. Co. v. Am. M. Co.* 152 Fed. 1008; *Johnson v. Computing S. Co.* 139 Fed. 339; *U. S. G. Co. v. Pacific G. Co.* 68 Fed. 442; *U. S. v. Am. B. T. Co.* 29 Fed. 17; *Carpenter v. Westinghouse A. B. Co.* 32 Fed. 434; *St. Louis W. M. Co. v. Consolidated B. W. Co.* 32 Fed. 802; *Rust v. United W. W. Co.* 36 U. S. App. 167; *State ex rel. Eau Claire D. Imp. Co. v. District Court,* 26 Minn. 233; *Middlebrooks v. Springfield F. Ins. Co.* 14 Conn. 301; *Aldrich v. Anchor C. Co.* 24 Oreg. 32; *Dillard v. Central Va. I. Co.* 82 Va. 734; *Ætna Ins. Co. v. Black,* 80 Ind. 513; *New-*

ell v. G. W. R. Co. 19 Mich. 336; *Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. Law, 222; *St. Clair v. Cox,* 106 U. S. 350; 19 Cyc. 1267, 1268, and cases cited; *Charter Oak L. Ins. Co. v. Sawyer,* 44 Wis. 387; 13 Am. & Eng. Ency. of Law (2d ed.) 869 *et seq.* and cases cited.

For the respondent there were cited, besides other authorities: 10 Cyc. 924, 925, 928, 940; *Jester v. Steam P. Co.* 131 N. C. 54, 42 S. E. 447; *Pope v. Terre Haute C. & Mfg. Co.* 87 N. Y. 137.

DODGE, J. It is of course true that the courts of this state cannot acquire jurisdiction over persons not present in the state, except for the purpose of adjudicating with reference to property or status here located. This is an inherent limitation upon the power and jurisdiction of the state under our form of government, and cannot be escaped by reason of local statutes declaring such power. *Jarvis v. Barrett,* 14 Wis. 591; *Smith v. Grady,* 68 Wis. 215, 31 N. W. 477; *Witt v. Meyer,* 69 Wis. 595, 35 N. W. 25; *Renier v. Hurlbut,* 81 Wis. 24, 50 N. W. 783; *Moyer v. Koontz,* 103 Wis. 22, 79 N. W. 50; *Maxcy v. McCord,* 120 Wis. 571, 98 N. W. 529, 98 N. W. 923; *Fitch v. Huntington,* 125 Wis. 204, 102 N. W. 1066; *Pennoyer v. Neff,* 95 U. S. 714; *Goldey v. Morning News,* 156 U. S. 518, 520, 15 Sup. Ct. 559. Hence, although our statute may in terms authorize a suit against a foreign corporation whenever the plaintiff resides in this state and the summons can be served upon some officer or agent of the corporation, those statutes must be ineffective to give jurisdiction unless the presence of such officer or agent within our borders amounts to presence of the corporation, for it is undoubtedly possible for an individual who, incidentally, is officer of a corporation to come into this state in his personal capacity without bringing the corporation with him. *Goldey v. Morning News, supra; Conley v. Mathieson A. Works,* 190 U. S. 406, 23 Sup. Ct. 728. It is however uniformly recognized that when a person, corporate or natural, does place it-

self within our territorial limits, jurisdiction over his or its person may be obtained to adjudicate personal liabilities to such extent as state statutes may authorize. So long as either maintains physical absence, this state has no right to insist that they must submit questions of mere personal liability to our courts, but when they voluntarily come within the state such immunity no longer exists. *Curtis v. Bradford,* 33 Wis. 190; *Eingartner v. Ill. S. Co.* 94 Wis. 70, 74, 68 N. W. 664; *Disconto Gesellschaft v. Umbreit,* 127 Wis. 651, 106 N. W. 821. A corporation ordinarily acts and moves in the person of some individual, and when any individual, officer, or agent is, within the authority committed to him, performing an act of the corporation, the latter must be deemed present physically in the person exercising its powers. While the affidavits in this case contradict each other, we see no reason to disagree with the conclusion of the trial court that the treasurer and manager of this corporation was in Fond du Lac negotiating adjustment of corporate liability on the very claim sued in this action. That such function is generally within the authority of such an officer can hardly be doubted, but that it was within Henningsen's authority is confirmed by other facts stated in the affidavits. Obviously had the negotiation proceeded to consummation the corporation would have acted. In other words, Henningsen at that time and for that definite purpose was the corporation, which, therefore, was present in this state. Hence there is no obstacle in the inherent limitations on the powers of the state, or in any prohibitions of the federal constitution, to the acquisition of jurisdiction by our courts by personal service of their process on the defendant present within our borders. The service in fact made was that authorized by our statute (subd. 13, sec. 2637, Stats. 1898), and was such as to satisfy all requirements of due process of law. *Fey v. I. O. O. F. Mut. L. Ins. Soc.* 120 Wis. 358, 98 N. W. 206; *Phillips v. Portage T. Co.* 137 Wis. 189, 118 N. W. 539.

By the Court.—Order affirmed.

MARLOW, Respondent, vs. CITY OF FOND DU LAC, Appellant.

November 13—December 7, 1909.

Municipal corporations: Injury from defect in street: Notice: Contributory negligence.

1. **Evidence that a mud hole nearly two feet deep, extending across the traveled track in a street, with an abrupt ascent at one end of about twenty inches where it joined the hard ground, had existed for years, and that before the accident frequent complaint thereof had been made to the street commissioner, is *held* to sustain a finding by the jury that the city had such notice of this condition that in the exercise of ordinary care it could have remedied the defect before the accident.**
2. **The question of plaintiff's contributory negligence in driving into a deep mud hole extending across the traveled track in a street is *held*, upon the evidence, to have been for the jury.**

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

L. E. Lurvey, for the appellant, cited, besides other cases, *Schrunk v. St. Joseph,* 120 Wis. 223, 97 N. W. 946; 29 Cyc. 513; *Devine v. Fond du Lac,* 113 Wis. 61, 88 N. W. 913; *Goldstein v. C., M. & St. P. R. Co.* 46 Wis. 404, 1 N. W. 37; *Hausmann v. Madison,* 85 Wis. 187, 55 N. W. 167; *Fisher v. Franklin,* 89 Wis. 42, 61 N. W. 80; *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241, 1087.

O. H. Ecke and *W. W. Hughes,* for the respondent, cited *Jung v. Stevens Point,* 74 Wis. 547, 43 N. W. 513; *Luedke v. Mukwa,* 90 Wis. 57, 62 N. W. 931; and other cases.

TIMLIN, J. In this case the jury found: (1) That the street at the time and place in question was not reasonably safe for public use; (2) that the city had notice of this condition for such time prior to plaintiff's injury that in the exercise of ordinary care it could have remedied the defect before the accident; (3) the condition of the street was the proximate cause of the injury to the plaintiff; (4) there was

no want of ordinary care on the part of the plaintiff contributing to his injury.

It is contended that there is no evidence to sustain the answer of the jury to the second question of the special verdict. The defect consisted of a mud hole or depression in the street from twenty to twenty-four inches deep, filled with soft mud to the top, and the hole extended entirely across the traveled track, and abruptly ascended at one end about twenty inches, where it joined the hard ground. This had existed for some years. When the mud was dry it formed no serious defect, but in very wet weather presented the condition of a depression filled to the top, or nearly to the top, with soft mud, into which a wagon would sink to a depth of nearly two feet to the hard bottom, and in crossing it the vehicle would reach the abrupt ascent before mentioned. Before driving in one could not tell how deep it was, or whether there was any danger in driving through it, and a witness testified that he had made complaint about this mud hole to the street commissioner of the city very frequently before the accident in question. We consider this sufficient upon which to rest the second question of the special verdict.

The main contention of appellant is that the plaintiff was guilty of contributory negligence on the undisputed evidence and notwithstanding the verdict of the jury to the contrary. The evidence on this point is that the plaintiff had never driven upon this street before, and that on the day in question, while he and his wife were driving along this street with a gentle horse, the horse walking slowly, they came to this mud hole. The further testimony of the plaintiff is as follows:

"Well, when we came there I saw a bad place there, a muddy place. And when I was pretty close on the north side of the road I stopped there, right close to that muddy place, and I told my wife it looked pretty bad—such a place—and she said: 'Yes; I think we better get out from the buggy.' I

said: 'No; we better stay in.' And I told her the other side looked just as bad; that we pass right in the center so the mud lay even with the road. . . . I thought it be more level there. . . . It looked pretty bad, but it didn't scare me. I wanted to make through. I thought it was at first all safe; that is the reason I passed. It looks pretty bad, but I didn't want to turn around and I passed through."

Another witness, more familiar with the place, testified that it was "an innocent looking mud hole to look at, looked like a mud puddle."

The question of contributory negligence is ordinarily one for the jury. Upon the authority of *Jung v. Stevens Point,* 74 Wis. 547, 43 N. W. 513, and *Luedke v. Mukwa,* 90 Wis. 57, 62 N. W. 931, we consider that on the evidence above quoted the question of plaintiff's contributory negligence in the instant case was for the jury. Finding no error in the proceedings below, the judgment must be affirmed.

By the Court.—Judgment affirmed.

SHARPE, Appellant, vs. HASEY and others, Respondents.

November 13—December 7, 1909.

Highways: Laying out: Offer of aid as inducement: Validity of order: Making and signing by supervisors: Evidence: Intent: Pleading: Amendment: Discretion.

1. Where a contribution or offer of pecuniary aid in case a highway shall be laid out is of such character or is made under such circumstances as would be likely to swerve the town board from its duties in the matter, it is against public policy and vitiates the action of the board; but no such result follows where the offered aid is so trifling and inconsequential in comparison with the cost of the proposed highway that it cannot reasonably be deemed to have been an inducement to the determination arrived at by the board.
2. An intent already formed is a fact and may be testified to like any other fact by the person who formed it.

3. Where a motion to amend the complaint was made after the close of the testimony, denial thereof on the ground that there had been no full presentation of the facts necessary to an intelligent determination of the question sought to be raised by the amendment cannot be held error, where such denial does not appear to have been an abuse of discretion.
4. The determination by town supervisors to lay out a highway must be made and the required order must be agreed upon at a legal meeting of the board; but after such proceedings are had it is not essential that the formal written order be actually signed at a board meeting.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The defendant supervisors on January 5, 1908, determined to lay out a highway across the lands of the plaintiff. At a meeting of the board, called for the purpose of acting upon the application to lay out the highway, prior to any action being taken, and prior to the determination of the board to lay out the same, Supervisor *Ott,* after consulting with Supervisor *Schultz,* asked one Boyum whether, if the board determined to lay out the highway, said Boyum would haul material for the bridges free of charge. Boyum, with some reluctance, and after it was suggested that his neighbors would help him to do the hauling, replied that he would; whereupon a vote was taken upon the proposition and it was determined by the town board to lay out the highway. The plaintiff, being the owner of the lands through which it was proposed to lay out said highway, brought this action to enjoin and restrain the defendants from entering upon his lands or taking any steps to carry out the building of the highway described in the order of the supervisors. The ground upon which the plaintiff sought relief in the original complaint was that the order was made as the result of a corrupt bargain between the defendant supervisors and Boyum, which was contrary to public policy, and that therefore the order was void.

At the close of the testimony plaintiff asked leave to amend his complaint so as to allege that the order laying out the high-

way was not made or signed on June 5th, but that on the contrary the supervisors separated on that day, and later the attorney for one of the parties interested in having the highway laid out drafted the order laying out the road, and that such order was signed on the following Monday by the supervisors without holding any meeting; one of them signing in the city of Columbus, and the others signing at another place in the absence of the chairman. The court refused to permit the amendment. From a judgment dismissing the complaint plaintiff appeals.

For the appellant the cause was submitted on the brief of *Richmond, Jackman & Swansen.*

Henry A. Gunderson, for the respondents.

BARNES, J. The trial court found as facts that the proposed road was one and one-half miles in length; that the value of the land which would necessarily be appropriated for its use was $700; that such highway would require the construction of two bridges and two culverts and the building of a grade and the filling in of a roadbed over about 160 rods of marsh; that at the time Boyum promised to haul the bridge material free of charge it was not contemplated that the value of such work would exceed $15 or $20; that such work would be reasonably worth from $30 to $40; and that the supervisors were not in any way induced to lay out such highway because of the promise made to haul the material free of charge, but were actuated by a desire to promote the public interest of the people of the town, and that they laid out the highway because of the public necessity therefor. There is sufficient testimony in the record to support each of the facts so found.

As a conclusion of law the court found that no cause of action was established. The conclusion so drawn was correct. Considering the expense of the proposed highway, the offered aid was so trifling and inconsequential that it could hardly be

an inducement to the board to arrive at the determination thereafter made.

We have no intention to depart from the doctrine of the cases which hold, in substance, that, where the contribution or offer of pecuniary aid is of such a character or is made under such circumstances as would be likely to swerve the town board from its duties, it is against public policy and vitiates official action. *State ex rel. Curtis v. Geneva,* 107 Wis. 1, 8, 82 N. W. 550; *Shelby v. Miller,* 114 Wis. 660, 663, 91 N. W. 86; *State ex rel. Dosch v. Ryan,* 127 Wis. 599, 106 N. W. 1093. Under the facts disclosed in this case it is well-nigh without the range of possibilities that official action was influenced by the offer made, and courts do not sit for the purpose of redressing speculative or theoretical wrongs.

The court permitted two of the supervisors to testify that they had already formed the intent to vote in favor of laying out the highway regardless of whether Boyum promised or refused to haul the bridge material free of charge. The appellant urges that it was error to admit this evidence, because a witness may not be permitted to say what he would have done in a supposed case. The evidence was competent. "An intent already formed is a fact just as much as any other physical fact." *Barker v. W. U. Tel. Co.* 134 Wis. 147, 153, 114 N. W. 439, 440; *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074; 1 Jones, Ev. § 170 (167).

The motion to amend the complaint was not made until after the close of the testimony and immediately before argument was begun on the day following. The court refused to permit the amendment, on the ground that there had been no full presentation of the facts necessary to an intelligent determination of the question sought to be raised by the amendment, as well as on other grounds. In view of the situation presented and the reasons given for disallowing the amendment, we cannot say that the court abused its discretion in de-

ciding as it did, and we cannot hold that error was committed except by finding that judicial discretion has been abused. *Phœnix Mut. L. Ins. Co. v. Walrath,* 53 Wis. 669, 676, 10 N. W. 151; *Kleimenhagen v. Dixon,* 122 Wis. 526, 530, 100 N. W. 826.

Appellant further urges that evidence showing that the order laying out the highway was not signed at a board meeting was offered and received without objection, and that therefore such order should be held to be a nullity, and especially so in view of the fact that as to the width of a portion of the road laid out there is a slight difference between the description contained in the order and that found in the petition for the highway. The trial court stated in its decision that the complaint in the action made no reference to this alleged defect in the proceeding, and that when the evidence referred to was admitted the purpose of offering it was not anticipated, and that there had been no full or fair trial upon the point. The court made a finding, however, to the effect that the chairman signed the order at Columbus prior to June 8th. There is no finding as to whether the order was signed by the other two supervisors at a legal meeting of the town board or otherwise, and we apprehend that this is the point which the court thought was not litigated sufficiently to warrant it in drawing any conclusion as to whether the order was signed at or outside of a board meeting. In view of the provision of sec. 1298, Stats. (1898), making the order presumptive evidence of the facts stated therein and of the regularity of all the proceedings prior to the making of the same, it would be a legitimate inference to draw that the order was in fact signed by a majority of the supervisors at a meeting duly called, if it were necessary to indulge in such a presumption. The court does find that at a legal meeting of the board of supervisors held on June 5th such board voted and determined to lay out the highway in question. An attorney who apparently was present at the meeting was employed to draft

the formal order. There is nothing to show that the order as finally signed did not comply with the determination of the board as made at its meeting. Sec. 1269, Stats. (1898), requires the supervisors of a town, on laying out a highway, to make and sign an order therefor. We entertain no doubt that the determination to lay out the highway must be made and the required order must be agreed upon at a legal meeting of the board. Whether, after such proceedings are had, it is necessary that the formal action should be reduced to writing in the form of an order and be actually signed at a board meeting is another question. The decision of the board acting as such is the essential thing. What follows in the way of making that decision effective and a proper matter of record is of a clerical character, and the necessity for community rather than individual action is not apparent. Town supervisors are not men generally learned in the law, and no good reason exists in favor of holding them to a strict accountability where only nonessentials are involved. The time for conference, consultation, and interchange of views had passed when the determination to lay out the highway had been reached. It must be presumed that each member of the board read the order as drafted before signing it, and that he was capable of understanding whether the order complied with the conclusion of the board, and that he would not have signed it if it did not. The reading and signing of the order could be done as well and as intelligently outside a board meeting as it could at such meeting. The statute does not in terms require that the order be signed at a board meeting, and the judgment in this case should not be reversed on the findings or on the facts established outside of and beyond them.

By the Court.—Judgment affirmed.

RIO STATE BANK, Respondent, vs. AMONDSON, Appellant.

November 13—December 7, 1909.

Banks and banking: Cashier's liability for shortage in cash.

1. A by-law of a bank, made part of the cashier's contract of employment, providing that he should be "responsible for all moneys, funds, and valuables of the bank" renders him liable for shortages resulting from mistakes or malfeasance of his assistant, although the by-laws make such assistant personally liable for moneys coming into his possession.
2. Proof that according to the books of the bank, kept by the cashier and his subordinates, certain amounts had on different days been received by the bank which had never been accounted for in the cash was, in the absence of explanation, *prima facie* proof that moneys of the bank to that extent were missing.
3. The liability of the cashier for such shortages in the cash is not affected by the fact that on other days there was more cash in the drawer than the books called for.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This is an action by the plaintiff, a banking corporation, to recover $59.80 of the defendant, its former cashier, which sum it alleges he received and never accounted for. The defendant denied any shortage, and also alleged that if any shortage in fact occurred it was in his absence when the bank was in charge of an assistant cashier, and hence that he was not responsible therefor. The action was tried before a jury. It appeared that the defendant became the cashier of the bank upon its organization in the fall of 1900 and remained such until January 30, 1905; that at the time he was elected and entered on his duties a by-law of the corporation, which was known to him, provided that: "The cashier shall be responsible for all the moneys, funds, and valuables of the bank, and shall give bond with security . . . conditioned for the faithful and honest discharge of his duties as such cashier, and that he will faithfully apply and account for all such moneys,

funds, and valuables," etc.; that he gave a bond conditioned in the words of the by-law; that another by-law of the bank provided that the assistant cashier should be responsible for all such sums of money, property, and funds as might from time to time be placed in his hands by the cashier or otherwise come into his possession, and should also give bond for the faithful discharge of his duties; that Charles Caldwell was appointed assistant cashier and gave bond, but that he was in other business, and only acted when he was requested to take charge of the bank during occasional absences of *Mr. Amondson;* that during the year 1904 the bank books showed three shortages of cash which have never been, and could not be, explained, viz.: January 10th, $10.80; May 31st, $20; and October 11th, $29—making a total of $59.80; that upon other days, distant in point of time from the shortages, there were certain excesses of cash found, called "longs," amounting to $74.50, which never had been, and could not be, explained.

There was evidence tending to show that the assistant cashier, Caldwell, was actually in charge of the bank on the days when the shortages occurred, and, as this was the only question of fact in the case, the court submitted to the jury, asking in effect, as to each shortage, whether it occurred while the assistant cashier was in charge. The jury answered "Yes" to each question, and the court upon motion rendered judgment for the plaintiff for the amount of the shortages, notwithstanding the verdict, from which judgment the defendant appeals.

W. C. Leitsch, for the appellant.

Daniel H. Grady, for the respondent.

WINSLOW, C. J. The action is brought upon the contract of employment, not upon the bond. The trial court granted judgment for the plaintiff *non obstante,* for the reason that he deemed the defendant's liability was fixed by the by-law, and

in this conclusion we agree. The by-law, whose terms he knew and which became a part of his contract, provided that he should be "responsible for all the moneys, funds, and valuables of the bank." Words of broader meaning could hardly have been used. They indicate unmistakably the intent of the corporation to place the whole responsibility for the safe conduct of the bank's business upon the shoulders of the cashier, whether the actual transactions should be carried on by him or by subordinates. This intent appears all the more plainly by comparing the liability thus placed upon the cashier with the limited liability placed upon the assistant cashier by the other by-law referred to in the statement of facts. Whether the cashier is made an insurer so that he would have to replace funds destroyed by fire or taken by robbery is a question not involved in the case and hence not decided. We are fully satisfied that the language was intended to and does fairly cover losses resulting from mistakes or malfeasance of the cashier or his subordinates.

The proof here showed that according to the books of the bank, kept by the defendant and his subordinates, $59.80 had been received by the bank which had never been accounted for in the cash. In the absence of explanation (and none was offered), this was *prima facie* proof that moneys of the bank to that extent were missing. The fact that on other and different occasions there was more cash in the drawer than the books called for cannot affect the defendant's liability. He does not claim to have paid it in, and, if others paid it in without receiving credit for it, those others are the ones to whom the bank is liable for it, if to any one.

By the Court.—Judgment affirmed.

BLOCK, Respondent, vs. CITY OF FOND DU LAC, Appellant.

November 13—December 7, 1909.

Municipal corporations: Adoption of parts of general charter: What provisions of special charter repealed: Injuries from defective sidewalks: Liability: Notice.

1. Where, pursuant to sec. 926, Stats. (1898), a city has adopted sections of the general charter law "in lieu of the provisions of its special charter," the adopted sections do not supersede any part of the special charter not within the same subject matter nor dependent upon the expressly displaced provisions.
2. Secs. 925—201 to 925—207 of the general charter law having, when adopted by the city of Fond du Lac, superseded the provisions of its special charter which made it the duty of lotowners to keep the sidewalks in repair and made them primarily liable for injuries caused by failure to perform that duty, the further provision imposing upon the city a secondary liability for such defaults of lotowners was also, by necessary implication, superseded; and, the exemption of the city (under sec. 2, subch. 18, of its charter) from liability under the general law being dependent upon and compensatory of the liabilities above mentioned, the abolition of those liabilities abolished that exemption.
3. In the absence of any special exemption from liability for injuries caused by defective walks, and of any liability specially created, the liability of a city in such a case is governed by sec. 1339, Stats. (1898).
4. Sec. 6*b*, subch. 18, of the charter of Fond du Lac (sec. 4, ch. 435, Laws of 1889),—requiring, as a condition precedent to the right to recover, notice to the city within thirty days after an injury caused by insufficiency or want of repair in any of the public ways of the city,—was not repealed by the adoption of secs. 925—201 to 925—207 of the general charter law, relating to the construction and repair of sidewalks.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to recover for an injury alleged to have been caused to plaintiff by an insufficient sidewalk in defendant city.

The injury was received October 29, 1907. Notice of the

claim therefor was served on the city clerk of defendant November 22, 1907, and a like notice was served upon the alderman of the ward where the injury occurred, November 26, 1907. The issues formed by the pleadings, respecting conflict in the evidence, were submitted to the jury, resulting in a finding that plaintiff was injured, as alleged, and that his recoverable damages were $1,500.

Judgment was rendered accordingly, exceptions being saved to raise questions discussed in the opinion.

L. E. Lurvey, for the appellant.

O. H. Ecke and *W. W. Hughes,* for the respondent.

MARSHALL, J. The principal question raised on the appeal is, Did the provisions of the defendant's special charter, respecting conditions of the right to recover compensation of the city for a personal injury caused by insufficiency of a sidewalk, remain in force after secs. 925—201 to 925—207, inclusive, Stats. (1898), of the general charter for cities, relating to sidewalks, were adopted in lieu of the special charter provisions on the same subject?

The adopted parts relate wholly to the construction and repair of sidewalks and keeping the same in a proper state of repair. They do not provide for any right of action against the city for injuries received by travelers because of insufficient sidewalks, nor prescribe any condition for the existence, nor any procedure for the enforcement, of any such right. So, necessarily, they did not supersede any part of the special charter, not within the same subject matter, nor dependent upon the expressly displaced provisions.

The subject referred to is found in the special charter at subd. 4, sec. 5, subch. 11, ch. 152, Laws of 1883, and a clause of sec. 1, subch. 18, making it the duty of lotowners to keep sidewalks in front of their premises in repair.

Subch. 18 is entitled "Miscellaneous Provisions." In connection with creating the duty of lotowners to keep sidewalks

in repair, any such owner failing to perform such duty was made liable to recompense any other person who, while walking thereon, should be injured by reason of such failure. Thus the duty to repair was made the basis of the liability. So it was recently held that the adoption of the general charter provision abolishing the duty, by necessary implication abolished the liability. *Willmer v. Goebel,* 137 Wis. 419, 119 N. W. 115.

By sec. 2 of subch. 18 aforesaid—explanatory of sec. 1 and, obviously, to negative any purpose to create a new right against the city, as to any person injured by reason of a sidewalk deficiency, and express a definite purpose to take the city out of the field covered by sec. 1339, Stats. (1898), leaving it not liable at all, strictly speaking, on the ground of negligence for any injury happening because of insufficiency of any sidewalk—it was provided as follows:

"It is hereby declared to be the true meaning and intent of this act, . . . that the city of *Fond du Lac* shall not, in any case, be liable to any person or persons, for damages resulting from the defective, unsafe or dangerous condition of any walk or sidewalk, . . . and the only cause of action to which the said city of *Fond du Lac* shall be liable, . . . shall be by reason of the failure of any person or persons to collect a judgment recovered against such owner, or owners, or corporation or society, for any such damages, resulting from such injuries, as hereinbefore stated."

The city's liability has been, not inaptly, called that of a guarantor. *Schaefer v. Fond du Lac,* 99 Wis. 333, 74 N. W. 810; *Devine v. Fond du Lac,* 113 Wis. 61, 88 N. W. 913.

It must be, and is, as I understand it, conceded, that, in the absence of any special exemption of a city from liability, in a case of this sort, and of any liability of the city specially created, the case would fall under sec. 1339, Stats. (1898). The decisions are uniform to that effect.

Now by the logic of *Willmer v. Goebel, supra,* abolition of the liability of the lotowner carried with it, necessarily, aboli-

tion of the liability for such lotowner's default, and, as exemption of the city from liability under sec. 1339, Stats. (1898), was compensatory, so to speak, of liability of the lotowner for his negligence and liability of the city for his default, respecting payment of the judgment against him, on account of his negligence,—the abolition of such two liabilities, necessarily, carried therewith exemption from liability under sec. 1339.

We have thus referred to all of the special charter respecting construction and repair of sidewalks. That part of subch. 18, relating to the right to recover for personal injuries, held, in *Willmer v. Goebel, supra,* to have been repealed, was not so held because of anything on the same subject being in the adopted provisions; but because such provisions displaced a portion of the old charter upon which such part depended.

There was added to subch. 18 of the old charter, by sec. 4, ch. 435, Laws of 1889, designated as sec. 6*b*, a provision making the right of any one to recover for any "injury or damage to" his "person or property, occurring by reason of the insufficiency or want of repair of any . . . sidewalk . . . in the city of *Fond du Lac,*" dependent on his having served on the city, as therein prescribed, a notice "within thirty days from the time" of the happening of the injury or damage, except in a class of cases not material here. It is conceded that such provision has been complied with, but insisted that it was repealed by adoption of the general charter provisions, so that the right of plaintiff to recover for his damages was dependent upon his serving notice on the city within fifteen days after the happening of the injury, in compliance with sec. 1339, Stats. (1898).

We are unable to appreciate counsel's reasoning, that the repeal of those portions of the special charter on the subject of the construction and repair of sidewalks, and those on the subject of liability dependent thereon, not including any liability, strictly speaking, of the city for negligence, also re-

pealed the provision relating to procedure to enforce common-law rights, and the condition of the existence of statutory rights of the nature of the one claimed here.

Sec. 6*b* referred to the whole subject of municipal liability for insufficiency of public ways, whether caused by neglect to perform a statutory duty, or by the creation of a nuisance by municipal act or permission. No reason is perceived why those portions of the charter repealed, necessarily affected sec. 6*b*, and, certainly, it does not cover anything included in the subject dealt with by those provisions of the general law adopted. It seems that the situation is the same as it would be if the city had been liable under sec. 1339 and sec. 6*b* had been enacted, making compliance with it a condition of the right under the general liability law. So, on this branch of the case, the decision must be for respondent.

The only other question raised is as to whether the judgment, including $1,375 for compensation for plaintiff's bodily injuries, is excessive. The writer is of the opinion that the award is materially too large to be warranted by the evidence, but the court is of a contrary opinion.

By the Court.—The judgment is affirmed.

BEYER and another, Respondents, vs. DOBEAS, imp., Appellant.

SAME, Appellants, vs. MORROW, imp., Respondent.

November 13—December 7, 1909.

Attachment: Waiver: Inclusion of other claims in judgment: Execution: Mortgages: Priority of liens: Equity: Subrogation.

1. When an attaching creditor takes judgment upon an amended complaint including claims other than those secured by his attachment, he will be deemed to have waived his attachment and to have elected to accept merely the lien and rights resulting from

the judgment, even where by reference to the pleadings it can be known definitely what amount of indebtedness secured by the attachment is included in the judgment.

2. Upon a judgment recovered by one who had attached land of the defendant, execution was issued in the form prescribed by subd. 1, sec. 2969, Stats. (1898), directing satisfaction out of any real property belonging to defendant at the date of the docketing of the judgment, and the sheriff sold and conveyed the interest which defendant had in the attached land at said date. The purchaser paid the full amount of the judgment, and all parties supposed that the procedure was such as to convey the whole interest of defendant at the date of the attachment. Upon foreclosure of a mortgage, the lien of which was subsequent to the attachment and prior to the judgment, it is *held* that the court properly imposed as a condition of the enforcement of the mortgage the recognition and satisfaction of a prior lien in favor of the execution purchaser for the amount paid by him.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The plaintiffs brought suit in statutory form to foreclose a mortgage on certain lands in Fond du Lac county, alleging the rights of *Dobeas* and *Morrow* to be subsequent and subject to the mortgage, which allegation they denied. The facts, mainly without dispute, are that on January 16, 1904, the title to the land was in the Badger Land & Lumber Company by a conveyance from Cyrus S. Hart, found to be void as to creditors. On that date Tibbs, Hutchings & Co. and Friend Bros. Clothing Company, creditors of Hart, commenced suits by attachment against him upon claims alleged to be then due the first named for $1,050 and some interest, and the second for $330.50 and interest. On May 27, 1904, plaintiffs' mortgage was executed for full value and without notice of the fraudulent character of the conveyance to the Badger Land & Lumber Company. Traverses to the attachment were interposed and the issues found against the traversors. On December 5, 1905, judgments were docketed for the attaching plaintiffs in both actions; that in favor of Tibbs, Hutchings & Co. being upon their amended complaint for

$1,566.87 damages, and that in favor of the Friend Company for $429.75 damages and costs. The amendment to the Tibbs, Hutchings & Co. complaint, made August, 1905, consisted in the addition of two more promissory notes aggregating $450 and interest, which existed but were not due either at the date of commencing the attachment suit or at the date of the mortgage. Upon the day of the docketing of the judgments, execution was issued under each judgment in the general form prescribed by subd. 1, sec. 2969, Stats. (1898), directing the sheriff to satisfy the judgment out of the personal property of Hart, or, if sufficient personal property cannot be found, then out of any real property "belonging to the said C. S. Hart on the day when the said judgment was so docketed in your county or any time thereafter." In obedience to such executions the sheriff levied them "upon all the right, title, and interest which the defendant Hart had on the 5th day of December, 1905, or since acquired," in or to the mortgaged premises, and duly published his notices of sale of the same interest. At the sale under the Tibbs, Hutchings & Co. execution the defendant *Dobeas* bid $1,850, the amount of that judgment, with costs, and received from the sheriff a certificate of sale of all the right, title, and interest which Hart had on the 5th of December, 1905, or has since acquired. At the same sale under the Friend Company judgment the defendant *Morrow,* who was attorney for both attaching plaintiffs, bid in the name of the two attaching creditors $475.64, being the amount of the Friend Company judgment, with interest and costs of sale, and received a like certificate of sale, and the executions were returned, with the money proceeds of the sale, fully satisfied and entry of satisfaction of the judgments made by virtue thereof. *Dobeas* and *Morrow* alleged in their answer in the foreclosure suit that the attaching judgment creditors intended and supposed that said executions directed a sale of all the interest of Hart on January 16, 1904, and prayed judgment that the executions be

amended so as to effect a sale under the provisions of subd. 2, sec. 2969, Stats. (1898), and their title be adjudged superior to the plaintiffs', and that they be subrogated to the rights of the judgment creditors to enforce the judgments as liens on such mortgaged premises as of the date of January 16, 1904. The trial court found, in addition to the facts above stated, that

"Tibbs, Hutchings & Co. and Friend Bros. Company were mistaken as to their existing rights and interests under their judgments. They assumed that, on the docketing of the judgments, the lien of the attachments merged in the lien of the judgments, and that the lien of the latter would relate back to the time that the lien of the former attached, and that an execution directing a sale of the interests of the debtor at the time of docketing the judgment would designate and carry the interests as of the day of the attachment. On this assumption the executions were issued and the sales and purchases made and the judgments satisfied. There was no intent to release or relinquish the attachment liens, nor was there any intent to make a choice or election as to courses of action to be pursued."

The court held that, while the procedure on the executions was not such as to effectively transfer all the title resting in Hart on January 16th so as to entirely cut off the plaintiffs' mortgage, through the assumed misunderstanding it was effective to transfer to the purchasers, who had paid the full amounts of the judgments, all the rights of the judgment plaintiffs under their judgments, and therefore that *Dobeas* and *Morrow* should be subrogated thereto and in this suit in equity adjudged to have a lien to the amount of those judgments prior to the lien of plaintiffs' mortgage; but that by reason of the amendment of the Tibbs, Hutchings & Co. complaint and the inclusion in one money judgment of claims which were not due at the time of the levy of the attachments, nor included in them, such attachments had thereby been discharged; hence that Tibbs, Hutchings & Co. had, and *Dobeas*

acquired, by the sale, no lien earlier than the date of the judgment.

The court rendered judgment ordering sale upon foreclosure of plaintiffs' mortgage, payment out of the proceeds to *Morrow* of the amount of the Friend Company judgment, and payment of the balance of the proceeds to the plaintiffs upon their mortgage debt. From the part of the judgment establishing a prior lien in favor of *Morrow* and application of part of the proceeds of the sale thereto, plaintiffs appeal. From that part of the judgment denying *Dobeas* any lien prior to the mortgage, he appeals.

For the plaintiffs there were briefs by *Greene, Fairchild, North & Parker,* and oral argument by *J. R. North.* They contended, *inter alia,* that *Morrow* is not entitled to relief through subrogation. This is a case of a valid and not a void judicial sale. Where property is sold at judicial sale there is no warranty as to either the title or the condition of the property. The purchaser must inquire for himself and see that he is getting what he considers that he is bargaining for, as the rule of *caveat emptor* applies in full force. 17 Am. & Eng. Ency. of Law (2d ed.) 1010; *Gray v. Denson,* 129 Ala. 406, 30 South. 595; *Burns v. Hamilton's Adm'r,* 33 Ala. 210; *Pullen v. Simpson,* 74 Ark. 592, 86 S. W. 801; *Tilley v. Bridges,* 105 Ill. 336; *Bishop v. O'Connor,* 69 Ill. 431; *Barron v. Mullin,* 21 Minn. 374; *Campbell v. Parker,* 59 N. J. Eq. 342, 45 Atl. 116; *Jewett v. Feldheiser,* 68 Ohio St. 523. 67 N. E. 1072; *Smith v. Wortham's Heirs,* 82 Va. 937; *The Monte Allegre,* 9 Wheat. 616, 648; *Main v. Bosworth,* 77 Wis. 660; *Stanhilber v. Graves,* 97 Wis. 515; *Buchanan v. Edmisten* (Neb.) 95 N. W. 620; *Calvert v. Ash,* 47 W. Va. 480, 35 S. E. 887; *Williamson v. Jones,* 43 W. Va. 562; *Smith v. Huntoon,* 134 Ill. 24; *Brady v. Carteret R. Co.* 67 N. J. Eq. 641. There was no mistake of fact in the case at bar; nor any misrepresentation by any officer of the court; nor any "mistake of law." At any rate, the sort of mistake

that appears here will not be relieved against. *Hayes v. Stiger,* 29 N. J. Eq. 196; *Campbell v. Parker,* 59 N. J. Eq. 342; *Boorum v. Tucker,* 51 N. J. Eq. 135; *Vattier v. Lytle's Ex'rs,* 6 Ohio, 477, 483; *Williamson v. Jones,* 43 W. Va. 562, 27 S. E. 411; *Burden v. Johnson,* 81 Mo. 318. And see especially *Norman v. Norman,* 26 S. C. 41, 11 S. E. 1096. The sale to *Morrow* being valid and not void, and as *Morrow* got something by his purchase, to wit, the legal title, he will not be relieved on the ground that the title is burdened with this mortgage. *Vattier v. Lytle's Ex'rs,* 6 Ohio, 477, 483; *Poppleton v. Bryan,* 36 Oreg. 69, 58 Pac. 36; *Holtzinger v. Edwards,* 51 Iowa, 383.

For the defendant *Dobeas* there was a brief by *Sheridan & Evans,* attorneys, and *A. L. Sawyer,* of counsel; for the defendant *Morrow* there was a brief by *Sheridan & Evans;* and the cause was argued orally by *W. L. Evans.*

DODGE, J. Dealing first with the appeal of *Dobeas,* the trial court rested its decision upon the principle, supported by a great array of authority, that when an attaching creditor, by amendment or otherwise, includes in his judgment causes of action other than those secured by his attachment, he will ordinarily be deemed to have waived his attachment, as of course he has a right to do, and to have elected to accept merely the lien and rights resulting from the judgment, which in Wisconsin, as in most states, consists of a lien on all the interest of the judgment debtor in real estate existing at the date of docketing the judgment. *Clough v. Monroe,* 34 N. H. 381; *Page v. Jewett,* 46 N. H. 441; *Boyd v. Beville,* 91 Tex. 439, 44 S. W. 287; *Heidel v. Benedict,* 61 Minn. 170, 63 N. W. 490; *Willis v. Crooker,* 1 Pick. 204; *Adams Bank v. Anthony,* 18 Pick. 238; *Freeman v. Creech,* 112 Mass. 180; *Clark v. Foxcroft,* 7 Me. 348; *Whitney v. Brunette,* 15 Wis. 61; *Barth v. Graf.* 101 Wis. 27, 76 N. W. 1100; *Oconto Co. v. Esson,* 112 Wis. 89, 87 N. W. 855. This doctrine unques-

tionably is founded on the idea of protection against fraud and upon the rule that the acts of the judgment creditor will be given a construction consistent with innocent intention rather than fraudulent. This is upon the idea that a judgment for a gross amount which in fact includes sums not secured by an antecedent attachment is upon the record so connected with that attachment as *prima facie* to imply a claim of lien for the whole amount of the judgment as of the date of the attachment, and that such record, if it were allowed to have effect, would necessarily work a fraud, for it would assert liens and rights in property to which the judgment creditor was not entitled, thereby clouding the title, and would disable holder of the property subject to such lien from the ordinary means of clearing his property by acts *in pais*. If a duly docketed judgment includes a sum for which no prior attachment was secured, the owner of the property cannot, by paying into court or to the judgment creditor the amount which was secured by the attachment, discharge the record lien and clear off the cloud. The setting up of an ostensible claim of the dignity and publicity of a record judgment, if false, is in itself fraudulent and oppressive, because it necessarily tends to deceive and to hinder and delay other creditors and subsequent lienholders. The law, therefore, resting on the presumption of innocence, assumes that, when an attaching plaintiff elects to enter a judgment inclusive of claims and causes of action which he could not rightfully claim to be secured by his attachment, he does so with the honest intention of thereby discharging his attachment lien and declaring that he rests exclusively upon the judgment. Counsel argues that, however correct this view with reference to the indistinguishable mingling in a judgment of the attachment debt with others, which characterized *Oconto Co. v. Esson, supra,* yet, when the judgment can be rendered certain by reference to the pleadings so that it can be known definitely what amount of indebtedness secured by the attachment is included in the

judgment, the rule ought not to apply to its full extent, but that plaintiff should be permitted to enforce the judgment to that extent against any property upon which the attachment lien had fastened which may have passed out of the hands of the judgment debtor at the time of the judgment. Careful examination of all the authorities upon the subject, however, fails to disclose any recognition of such a distinction, while some expressly or impliedly deny it. *Fairfield v. Baldwin,* 12 Pick. 388, 397; *Peirce v. Partridge,* 3 Met. 44, 49; *Clark v. Foxcroft, supra.* When we recall that the injury to the plaintiff results from the presence on public records of the judgment in combination with the prior attachment which together *prima facie* assert a lien for the full amount, and that the same records do not of themselves convey the information necessary to a separation of the amount secured by the attachment from that not so secured, it is apparent that some portion at least of the oppression and injury which the general rule is intended to prevent must still necessarily be suffered by the owner of the property or a subsequent lien thereon. His rights are still hindered by an obstacle which he can remove only at the expense of affirmative proceeding in court. An illustration of the predicament in which the owner of the property is placed is presented in the present case. The judgment was for an amount approximating $1,800, of which some $500 was not entitled to lien prior to plaintiff's mortgage. The execution commanded the sale of exactly the same interest in the property for that additional $500 as it did for the portion of the judgment which might be ascribed to the causes of action named in the affidavit, thereby distinguishing the situation from *Laighton v. Lord,* 29 N. H. 237; *Cutler v. Lang,* 30 Fed. 173, holding that the fraud may be purged by prompt restriction of the judgment and execution to the true amount. Plaintiff could not at any time have availed himself of the convenient statutory methods of clearing the property from the legitimate lien. He could not have paid to the sheriff

such amount and imposed on him the duty to stop the sale. He could not, after the certificate of sale issued, make redemption in the manner which the statute provides as a right to one whose property is subject to such liens; and further, the deed, when issued by the sheriff, would have been an uncertain and indefinite cloud upon the plaintiff's rights.

For these reasons, and in deference to the authorities above cited, the rule of which seems to be fully adopted by this court in the *Oconto Co. Case,* we must conclude that the instant situation presents no exception to the general rule, but must hold that when Tibbs, Hutchings & Co. asserted their right to enter judgment for $1,800, to issue execution, and sell an interest in this property to satisfy said amount, they must be deemed to have intended to assert that right as of the date of the judgment, since a claim as of the earlier date of the attachment would have been a legal fraud—the assertion of a right unsupported by law and injurious to the plaintiff. That a subsequent incumbrancer is entitled to protection by such construction as well as a subsequent attaching plaintiff is declared in *Oconto Co. v. Esson, supra* (p. 103).

Turning now to the appeal of the plaintiffs, the salient facts are that their mortgage was subject to the right of the Friend Company to be paid its judgment out of this real estate. The trial court has, at most, decided that no ground has been shown by the plaintiffs to change this situation and to advance their lien over that which, confessedly both in law and equity, was prior to it. It is entirely clear that through some confusion of mind the formal title conveyed by the sheriff's deed fails to convey the whole interest on which the Friend Company had a judgment lien by aid of its attachment. There can be no doubt that all parties supposed the procedure was such as to accomplish that. The fact that the mortgage debt far exceeded the value of all the property renders certain the absence of any intention to sell or to buy merely some surplus above that debt. We need not decide

whether the evidence discloses such laches or carelessness on the part of those making the sale that a court of equity would not affirmatively intervene in their behalf, for it is the plaintiffs and not the defendants who have invoked the activities of the court and asked it to bring about a result whereby the plaintiffs' interests shall be enlarged without any consideration passing from them and whereby the interest of the judgment creditor shall be practically abolished without the judgment having been paid. This is obviously a situation arousing the duty of a court of equity to impose as a condition of the enforcement of the plaintiffs' rights the recognition and satisfaction of the equitable rights of others. *Hammond v. Erickson,* 135 Wis. 570, 116 N. W. 173. The judgment accords the plaintiffs all that they acquired by their mortgage, and we are satisfied deprives them of nothing to which they were equitably entitled.

By the Court.—Judgment affirmed.

HOGANSON, Respondent, vs. KNUTSON and another, Appellants.

November 13—December 7, 1909.

Contracts: Breach: When action may be brought.

A subcontract for a building required performance within a specified time and provided that if the subcontractor should neglect or refuse to complete his contract the principal contractor might take over the work and proceed to complete it, and that in such case no further payments should be made to the subcontractor until the completion of the work, and upon the final settlement to be then made he should only be allowed for the actual value of what he had furnished, and in addition to the stipulated damages he should be liable for all loss and damage and all increased cost of erecting and completing the building caused by his default. *Held,* that upon a breach by the subcontractor the principal contractor's right of action against him accrued at once, and the contract did not require the action to be postponed until after the completion of the work.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

About May 1, 1907, the plaintiff contracted to erect a church building in the village of New Munster and to complete the building by the 1st of January, 1908. In the event of his not completing the building at that time he agreed to pay the church congregation the sum of $5 for each day the building remained uncompleted after the 1st day of January, 1908. On May 3, 1907, the defendant *Knutson* contracted with the plaintiff to do the excavating, mason work, plastering, and stucco work, and to furnish certain material and labor therefor for the sum of $6,806. This contract provided for the completion of the brickwork by the 15th day of August and the remainder of the work by October 15, 1907, and for the forfeiture to the plaintiff of the sum of $5 per day as liquidated damages for each day after either of said dates that the parts of the construction so undertaken by *Knutson* remained uncompleted, provided such delay was not caused by uncompleted carpenter work. The contract stipulates that if *Knutson* shall neglect or refuse to complete his contract, then the plaintiff,

"after giving [*Knutson*] five days' notice in writing, may take over said work, including all material, appliances, and staging on the ground, and may procure the necessary labor and material to complete this contract according to the provisions thereof; and, in case of [plaintiff's] so taking possession, no further payments shall be made to [*Knutson*] hereunder until the completion of said work, and, upon the final settlement to be then made between the parties, [*Knutson*] shall only be allowed for the actual value according to this contract of the material and work he may have furnished, and in addition to the liquidated damages hereinafter mentioned he shall be liable to the [plaintiff] for all loss and damage and all increased cost of erecting and completing said building caused by his failure or neglect."

Knutson was to be paid in monthly instalments of eighty-five per cent. of the value of the work done during the month,

the remaining fifteen per cent. to be paid him upon the final completion of the work and its acceptance by the plaintiff. To secure the performance of the agreement between the plaintiff and *Knutson,* a bond in the sum of $3,000 was given by the defendants.

On July 22, 1907, certain work which had been performed by the subcontractor was condemned by the supervising architect and it was taken down and reconstructed, thereby delaying the completion of the work. The brickwork was not completed by the 15th day of August. On October 5th, while the brickwork was still uncompleted, the defendant *Knutson* abandoned the work. On October 14, 1907, the plaintiff undertook the completion of the contract and completed the brickwork December 15, 1907.

It is alleged in the complaint that owing to the failure of the defendant *Knutson* to complete his contract plaintiff has been delayed in carrying out his contract for 124 days, and that the defendant *Knutson* has become indebted to the plaintiff in the sum of $620 as the liquidated damages; that the plastering, stucco, and concrete work on the building remain uncompleted and that it will cost the plaintiff $1,340 to complete them; that plaintiff expended $4,835.47 in completing the brickwork; that $1,826 was paid to the defendant *Knutson;* and that *Knutson* is entitled to a credit of $50.89 for material left by him and used in the construction of the building.

The bond given by the defendant the *United States Fidelity & Guaranty Company* provided, "That said principal [*Knutson*] shall well and truly indemnify and save harmless the said obligee [*Hoganson*] from any pecuniary loss resulting from the breach of any of the terms, covenants, and conditions on the part of the said principal to be performed," and also that the surety company should not be "subject to any suit, action, or other proceeding thereon that is instituted later than the 15th day of January, A. D. 1908."

This action was commenced on January 10, 1908, while the building was still uncompleted. This is an appeal from the order of the circuit court overruling a general demurrer of the defendants to the complaint.

For the appellants the cause was submitted on the brief of *Wallace Ingalls,* attorney, and *Sanborn & Blake,* of counsel.

For the respondent there was a brief by *George W. Waller,* attorney, and *John B. Simmons,* of counsel, and oral argument by *Mr. Waller.*

SIEBECKER, J. The allegations of the complaint aver a breach of contract by the subcontractor and consequent damages to the principal contractor, the plaintiff. It is claimed that no cause of action accrued to the plaintiff by such breach of the contract by the defendant *Knutson,* since the agreement with *Knutson* was that if he defaulted in performance of the contract and plaintiff proceeded with the work of construction as provided in the contract, then "no further payments [should] be made to [*Knutson*] until the completion of said work, and, upon a final settlement to be then made between the parties," *Knutson* should only be allowed for what he had actually furnished under the contract, and, in addition to the stipulated damages, *Knutson* was to be liable to the plaintiff "for all loss and damage and all increased cost of erecting and completing said building" caused by his default. The argument is that this agreement operates to bar all action against *Knutson* until the construction of the building has been completed by the plaintiff. These stipulations provide what losses caused by *Knutson's* default shall be charged to him, and that until completion of the entire structure as provided by plaintiff's contract he shall not be entitled at the time of and after such default to demand payment of the amounts remaining unpaid for work performed and material furnished by him. Such provisions are common in building contracts and are inserted to secure prompt performance of the work

of construction. We however find nothing in them showing that it was mutually understood that the plaintiff's right of action for breach thereof was to be postponed until the completion of the entire work undertaken by the plaintiff. It is not claimed but that plaintiff's right of action accrued upon *Knutson's* default and that he was at liberty to institute his action to recover for the breach at any time thereafter, unless these stipulations effected a postponement of the right of action until the entire building had been fully completed. An application of the stipulations to the circumstances of the case makes it evident that the parties intended to specify the basis of adjustment of the damages finally resulting from a breach. We discover no agreement therein for postponing the commencement of the action which accrued upon the breach of the contract. There is nothing in the agreement affecting the right of the plaintiff to institute an action to enforce his right of action which accrued at the time of *Knutson's* default.

It is, however, averred that the damages are not provable until the plaintiff has actually completed the work *Knutson* failed to perform under this contract. We discover no such absolute obstacle to the enforcement of plaintiff's rights. It may well be that the plaintiff, by having let the contract to other responsible parties, knew definitely before he brought action how much it would cost him to complete *Knutson's* contract, or that he possessed full information as to the actual cost of the uncompleted part of the work and the material required to complete it. Furthermore, should plaintiff fail in his efforts to establish all of the alleged damages caused by *Knutson's* default, this would operate to the advantage of *Knutson* and the surety company, and thus no cause of complaint by them can exist on this ground. We are of opinion that the plaintiff's right of action for the damages caused him by *Knutson's* default accrued immediately upon breach of the contract, that the stipulations in the contract do not bar him from the right to then institute an action to recover his dam-

ages, and that the complaint alleges sufficient facts to show that he had actually suffered damages at the time the action was commenced. It must be held that the lower court properly overruled the demurrer to the complaint.

By the Court.—The order appealed from is affirmed.

TRAVELERS INSURANCE COMPANY, Respondent, vs. PIERCE ENGINE COMPANY, Appellant.

November 15—December 7, 1909.

Contracts: Construction: "Audit:" Appeal: Findings of fact: Arbitration and award: Scope: Conclusiveness: Effect on pending action: Evidence: Admissions: Arbitration agreement, when binding: Acceptance: Notice of hearings: Waiver of objection to arbitrator.

1. The word "audit," though sometimes restricted to a mere mathematical process, generally includes investigation, weighing of evidence, and deciding whether items should or should not be included.
2. In ascertaining the scope of a submission to arbitration under an ambiguous agreement therefor, the negotiations between the parties and circumstances under which the agreement was made may be considered.
3. Where the proper construction of an ambiguous contract depends in a measure upon somewhat confused facts and upon the inferences of intention to be drawn therefrom, the conclusion of the trial court as to such construction is entitled to the weight of the ordinary finding of fact.
4. Where by an arbitration agreement the parties submit to an auditor the question of the amount due to one of them, involving matters of fact and of law, the jurisdiction of such arbitrator is as broad as that of a court, and his honest conclusion, even though erroneous, within that jurisdiction is as binding upon the parties.
5. An agreement to submit to arbitration matters involved in a pending action *ipso facto* dismisses that action.
6. A recital in an arbitration agreement that it is made in consideration of the dismissal of an action amounts to an admission of such dismissal.

7. Where by an arbitration agreement the amount due plaintiff is to be determined by plaintiff's auditor after inspecting and auditing defendant's books, the plaintiff by sending its auditor to examine the books accepts the agreement and becomes bound to do such acts as will give it full effect; and defendant cannot thereafter object that the agreement is unilateral and without consideration.

8. Where a party to an arbitration agreement was given full opportunity to be present before the arbitrator at all material times and availed himself of such opportunity, he cannot thereafter complain that the agreement failed to provide for notice of hearings and that no notice was in fact given to him or to the other party.

9. That the arbitrator was an employee of one of the parties is not a legitimate objection to the award, where both parties knew that fact when they agreed upon him as arbitrator.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Defendant having been insured by plaintiff against liability for injuries to certain classes of its employees during the year ending November 1, 1903, upon an agreement that it should pay for the insurance fifty cents on each $100 of wages paid to certain differently described and defined classes of employees during the year, shortly after that date made a statement to the plaintiff to the effect that its actual wages paid had been $27,004, upon which, after having paid $100 of premium at the commencement of the year, resulted a liability of $35.02 additional premium. Defendant failing and neglecting to pay this upon demand, suit was commenced therefor, in which, in the form of a general denial, it denied any liability. Thereafter, before trial, the parties entered into an agreement reciting pendency of this suit, and defendant's willingness to pay such sum as shall appear due upon a proper audit of its pay roll, and continuing:

"Now, therefore, in consideration of the dismissal by the plaintiff of the action aforementioned, the *Pierce Engine Company* hereby agrees:

"(1) That the *Travelers Insurance Company* may at any

time, by its regular auditor, inspect and audit the pay-roll books of the *Pierce Engine Company* for the purpose of ascertaining the exact amount earned as premium during the period in which the said policy of insurance was in force, and that for the purpose of such audit it will grant to the said auditor free access to all the original books and papers relative to the said pay roll, and will give him such assistance as he may require in making said audit.

"(2) That, when said auditor shall as aforesaid ascertain the amount earned by said policy in excess of one hundred ($100) dollars already paid, the *Pierce Engine Company* will pay the amount so found to be due to the *Travelers Insurance Company,* together with the interest thereon at the rate of six per cent. per annum from the 1st day of November, 1903, to date, the court costs of the said action, the expenses of Messrs. Vilas and Karsten in Racine amounting to two and 84-100 dollars ($2.84), which said payment shall be received in full settlement of all claims against the said *Pierce Engine Company* by reason of said policy."

The auditor examined defendant's books throughout the year, and received explanation thereof from defendant by its managing officer, A. J. Pierce, together with statement of his contentions as to certain classes of employees whose wages he claimed ought not to be included under the terms of the application and policy in the basis for ascertaining the premium, and made a determination of the amount of the pay roll upon which the premium must be computed, and of the amount of total premium at $198.28, of which, as before stated, $100 had previously been paid. The present action is brought to recover that amount upon the written agreement to pay the amount found by said auditor.

The principal defense set up by the answer was that the report of the auditor included certain employees and wage earners who were not "covered by said policy," notably those engaged in boat building. The application for insurance described the business of defendant as "manufacturing of gas and gasoline engines and launches." It provided for the pay-

ment as premium of a certain percentage of the pay roll, as above stated, and declared "the estimated pay roll includes the wages of all piece workers employed in the factories or shops, drivers and drivers' helpers and all other employees, except as follows;" no exceptions being specified.

Upon the trial it was proved that the auditor examined the books, took the statements of the defendant as to the character of the various employees and explanation of the claims of defendant as to those whose wages or salary should be omitted, duly weighed all the considerations, and made the determination before stated. The defendant then undertook to prove that certain classes of employees or wage earners were included, also to prove what claims were made with regard to them by the defendant. The court, after argument, held that the agreement was one of submission to arbitration of the general question of the amount due from the defendant to the plaintiff, and excluded such evidence and other evidence in review of the auditor's procedure and decision, and accordingly rendered judgment for the plaintiff for the amount found due by the auditor, from which judgment the defendant appeals.

W. W. Rowlands, for the appellant.

For the respondent the cause was submitted on a brief signed by *Charles A. Vilas,* attorney, and *Irving A. Fish,* of counsel.

DODGE, J. There is but one substantially disputed material question on this appeal, and that is whether the agreement was a submission of the question of the amount due, involving law and fact, or a mere submission to the auditor to mathematically compute the amount of the wages shown by the books to have been paid to the employees upon whose pay roll the contract of insurance required the premium to be based. The agreement may perhaps be ambiguous. The word "audit" is sometimes restricted to a mere mathematical process, but generally is extended to include the investigation,

weighing of evidence, and deciding whether items should or should not be included. *People ex rel. Ramsdale v. Orleans Co.* 16 Misc. 213, 38 N. Y. Supp. 890; *People ex rel. Hamilton v. Jefferson,* 35 App. Div. 239, 54 N. Y. Supp. 782; *People ex rel. Brown v. Board,* 52 N. Y. 224; *People ex rel. Myers v. Barnes,* 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; *Territory ex rel. Donzelmann v. Grant,* 3 Wyo. 241, 21 Pac. 693; *In re Clark,* 5 Fed. Cas. 853. Here it is obviously used in a sense to enable the auditor to ascertain the final amount which the defendant owed, which indicates the broader meaning. However, this agreement was made in the light of various surrounding circumstances, such as the suit already commenced, negotiations between the parties wherein the plaintiff's contention as to the proper construction of the application and policy had been advanced, and many other facts proper to be considered in ascertaining the meaning of the parties. From these as well the trial court reached a conclusion in favor of such broader construction. As that conclusion, in some measure at least, depends upon somewhat confused facts and upon the inferences of intention to be drawn therefrom, it is entitled to the weight of the ordinary finding of fact. *Vilas v. Bundy,* 106 Wis. 168, 81 N. W. 812; *Chicago, St. P., M. & O. R. Co. v. C., M. & St. P. R. Co.* 113 Wis. 161, 170, 87 N. W. 1085, 89 N. W. 180. We do not think that conclusion is antagonized by any necessary construction of the words of the agreement, and we do not find any such clear preponderance of evidence as would justify us in disturbing a finding of fact. It must therefore stand as the basis upon which the rights of the parties must be determined.

The scope of the submission to arbitration being as we have stated, the province and jurisdiction of the arbitrator was as broad as that of a court and his conclusion within that jurisdiction as final upon the parties. His duty was, as counsel for defendant contends, to make a proper audit; but such proper audit was merely to ascertain the facts and decide on

the rights of the parties honestly and by application of his best judgment. It was not necessarily to make a correct audit or to decide unerringly, according to the view of the court in which his determination is sought to be enforced. *Chandos v. Am. F. Ins. Co.* 84 Wis. 184, 54 N. W. 390; *McAlpine v. Trustees,* 101 Wis. 468, 78 N. W. 173; *John Pritzlaff H. Co. v. Berghoefer,* 103 Wis. 359, 364, 79 N. W. 564; *Coorsen v. Ziehl,* 103 Wis. 381, 384, 79 N. W. 562; *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, 85 N. W. 485; *Eau Claire v. Eau Claire W. Co.* 137 Wis. 517, 119 N. W. 555. There is no allegation in the answer and no proof offered that the arbitrator was guilty of any fraudulent or arbitrary action or fell into mistake in any other sense than that it is claimed he decided erroneously as to certain contentions urged by defendant. But such a submission to arbitration as we have determined this to be confers just that jurisdiction to decide erroneously, if honestly, and to bind the parties to such determination by force of their agreement to be so bound. There is therefore nothing shown to warrant excusing defendant from performing its plain agreement to pay the amount found due by the auditor.

Various somewhat technical contentions are presented by the appellant, most of which disappear in the light of our conclusion as to the scope of the submission. Some of them are perhaps independent of it. One of these is that the dismissal of the first action was a condition precedent to the efficacy of the arbitration agreement, and that no proof of such dismissal has been offered. This contention is somewhat inconsistent with what is said elsewhere in appellant's brief, to the effect that an agreement to submit to arbitration the matters involved in a pending action *ipso facto* dismisses that action. This rule seems to be well established and of itself defeats the contention. *Muckey v. Pierce,* 3 Wis. 307; *Jones v. Thomas,* 120 Wis. 274, 278, 97 N. W. 950. But it must also be noted that the contract itself, on its face at least, amounts to an ad-

mission of the dismissal of the action. It recites that the agreement is made in consideration of such dismissal, not of an agreement to dismiss.

Further it is argued that the arbitration agreement is unilateral and without consideration. Apart from the executed consideration of the dismissal of the pending suit, we have no doubt that the plaintiff, after having availed itself of the agreement by sending its auditor to examine defendant's books, had accepted the same and became bound to such acts on its part as would give it full effect, and that if the auditor's report had been a less sum, or even no sum at all, it would have been final upon the plaintiff. *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 93 N. W. 459; *W. G. Taylor Co. v. Bannerman,* 120 Wis. 189, 192, 97 N. W. 918.

A complaint that no notice was required by the agreement or was in fact given of any hearing by the arbitrator is met by the fact that the defendant was given full opportunity to be present at all material times and availed itself of such opportunity. It cannot complain that the other party failed of notice.

The fact that the arbitrator was an employee of plaintiff is not a legitimate objection, since both parties knew the fact and had a right to waive objection thereto and accept such person as arbitrator. *Fox v. Hazelton,* 10 Pick. 275; *Strong v. Strong,* 9 Cush. 560, 573.

We find no other error assigned which seems worthy of mention or discussion, or which would justify reversal.

By the Court.—Judgment affirmed.

BURTON and others, Appellants, vs. DOUGLASS and others, Respondents.

November 15—December 7, 1909.

Contracts: Construction: Agreement not to engage in business in city "or vicinity:" Ambiguity: Parol evidence.

1. Practical construction placed by the parties in interest upon doubtful or ambiguous terms in a contract will exercise a great and sometimes a controlling influence in determining the construction to be placed thereon by the courts.
2. An agreement not to engage in the flour and feed business at a certain city "or vicinity" is *held* not to have precluded engaging in such business in villages about six and one-half miles from said city, both parties having practically so construed the contract—one by engaging in the business at such villages within a few months after the agreement was made, and the other by not objecting thereto until several years later, although prompt objection had been made when it was thought the agreement was about to be violated with respect to the city.
3. Parol evidence to show that at the time of executing a contract the parties substantially agreed upon the definition of an ambiguous term therein does not alter or add to the written contract, but simply goes to show what they meant when they used that term.

APPEAL from a judgment of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Affirmed.*

For many years prior to October 5, 1903, the firm of Douglass & Dunn was engaged in the business of selling flour and feed at the city of Lake Geneva. For some months prior to said date the firm of Burton & Denison was engaged in a like business, the firm consisting of *W. E. Burton* and *E. D. Denison.* On said date the firm of Douglass & Dunn (consisting of the defendants *Horace G. Douglass* and *Edward F. Dunn*) agreed to sell and convey to *Lucretia D. Burton* certain real estate owned by them in the city of Lake Geneva as well as their stock in trade and the good will of their business. The stock in trade was to be paid for at its inventory value, based

on cost price. For the remainder of the property the vendee agreed to pay $10,000, of which amount $2,000 was presently paid and the balance was to be paid on November 5th. On the last-named date *Lucretia D. Burton, John E. Burton,* and *Ebenezer Davidson* formed a copartnership with the members of the firm of Burton & Denison for the purpose of continuing the flour and feed and other business carried on by said firm and also for the purpose of carrying on the business purchased by *Lucretia D. Burton* from the firm of Douglass & Dunn. A portion of the property purchased by *Lucretia D. Burton* from Douglass & Dunn was purchased by the new firm and a portion of it was leased to it. The trial court, in deciding the case, held that *Lucretia D. Burton* made the purchase from Douglass & Dunn as a mere intermediary and in behalf of the firm of Burton & Denison. On the day the original contract between Douglass & Dunn was made (October 5th), a separate contract was entered into between the firms of Douglass & Dunn and Burton & Denison, as follows:

"Whereas, Douglass & Dunn have this day contracted to sell to *Lucretia D. Burton* their flour and feed business, together with the real estate upon which the improvements used to operate such business are situate; and, whereas, Burton & Denison, now in similar business, expect to repurchase such business of said *Lucretia D. Burton:* Now, therefore, it is mutually agreed by and between Douglass & Dunn and each of them and Burton & Denison and each of them, that in case the above-mentioned contract shall be carried out and such sale and purchase made, for value received, each in consideration of the promise of the other, that Douglass & Dunn or either of them, for a term of ten years at Lake Geneva or vicinity, shall not enter into or engage in the flour and feed business without first making an attempt and in good faith offering a reasonable price to purchase the flour and feed business of Burton & Denison; and Burton & Denison agree for a term of ten years that they or either of them will not dispose of the flour and feed business of said last-mentioned firm or of either party to any third party without first making an offer in good faith and for a reasonable price of said business

to said Douglass & Dunn, but this agreement shall not preclude either partner of said last-mentioned firm from selling to the other partner or in taking in a third partner prior to December 1, 1903."

The payments called for by the contract between Douglass & Dunn and *Lucretia D. Burton* were made, and the title to the property purchased passed to *Lucretia D. Burton* and her assigns, and thereupon the firm of Douglass & Dunn ceased to carry on its former business in Lake Geneva.

On January 16, 1904, the defendants *Horace G. Douglass* and *Edward F. Dunn* started a flour and feed business at the village of Williams Bay, located about six and one-half miles from Lake Geneva, and during the month of March following engaged in a like business at the village of Zenda, also located about six and one-half miles from Lake Geneva. In the meantime said defendants offered to repurchase the business sold to *Burton, Denison,* and *Davidson* at Lake Geneva. The offers made were rejected, and the court found that such offers were not reasonable. Said defendants advertised the business carried on at Williams Bay and Zenda in the Lake Geneva newspapers, and sold a small quantity of flour and feed from such places to customers at Lake Geneva. On January 20, 1908, the defendant *Harold J. Douglass,* a son of *Horace G. Douglass* and a nephew of *Edward F. Dunn,* started a flour and feed business at Lake Geneva. This business was started with money contributed by the father, mother, and uncle of *Harold J. Douglass.* Plaintiffs contended that this business was really that of the former firm of Douglass & Dunn, and that it was carried on under the name of *Harold J. Douglass* for the purpose of evading the terms of the aforesaid contract. Until a short time before this action was begun, no claim was made by plaintiffs that the defendants had violated their contract by engaging in business at Williams Bay and Zenda.

The action was brought to enjoin the defendants from en-

gaging in the flour and feed business at Lake Geneva, Williams Bay, and Zenda, and other places in the vicinity of Lake Geneva, and to compel the defendants to account for the profits of the business carried on in violation of the contract. The circuit court found that *Harold J. Douglass* was conducting his individual business at Lake Geneva, and that the members of the firm of Douglass & Dunn had no interest therein. The court further found that said firm did not engage in business in the vicinity of Lake Geneva within the intent and meaning of their contract, and judgment was entered dismissing the complaint, from which judgment this appeal is taken.

For the appellants there was a brief by *Quarles, Spence & Quarles* and *Charles S. French*, attorneys, and *J. V. Quarles, Jr.*, of counsel, and oral argument by *J. V. Quarles, Jr.*

For the respondents there was a brief by *Frederick Kull*, attorney, and *Ryan, Merton & Newbury*, of counsel, and oral argument by *T. E. Ryan*.

BARNES, J. There is sufficient evidence to support the finding of the trial court that the business carried on at Lake Geneva by the defendant *Harold J. Douglass* was his own, and that his codefendants were not interested therein.

The trial court further found that the members of the firm of Douglass & Dunn did not breach their contract by engaging in business at Williams Bay and Zenda, as these places were not in the "vicinity" of Lake Geneva within the meaning of the term as used in the contract. The word "vicinity" does not express any definite idea of distance. Used in some connections it may mean a very trifling space; used in others it may mean thousands of miles. *In re Hancock St. Extension*, 18 Pa. St. 26; *State v. Meek*, 26 Wash. 405, 67 Pac. 76; *Schmidt v. Kansas City D. Co.* 90 Mo. 284, 1 S. W. 865, 2 S. W. 417; *Langley v. Barnstead*, 63 N. H. 246.

The parties to the contract no doubt intended that the firm

of Douglass & Dunn should not materially depreciate the value of the good will of the business sold, or of the business itself, by entering into active competition on a substantially even basis with the plaintiffs for trade naturally tributary to their store at Lake Geneva. Where this line should be drawn depends on the facts established. Some mere trifling and inconsequential encroachment would not be a violation of the agreement, as that would be a difficult thing to avoid, even if defendants engaged in business at a point remote from Lake Geneva. Any substantial encroachment, however, would be.

The contract being ambiguous in failing to prescribe a definite distance from Lake Geneva within which the firm of Douglass & Dunn should not engage in business, the construction placed thereon by the parties themselves becomes important.

Practical construction placed by the parties in interest upon doubtful or ambiguous terms in a contract will exercise a great and sometimes a controlling influence in determining the construction to be placed thereon by the courts. *Janesville Cotton Mills v. Ford,* 82 Wis. 416, 430, 52 N. W. 764; *Walsh v. Myers,* 92 Wis. 397, 401, 66 N. W. 250; *Murray Hill L. Co. v. Milwaukee L., H. & T. Co.* 110 Wis. 555, 566, 86 N. W. 199; *Jones v. Thomas,* 120 Wis. 274, 280, 97 N. W. 950; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 554, 93 N. W. 459.

The firm of Douglass & Dunn placed a practical construction upon the contract by engaging in business at Williams Bay within a couple of months after their contract with plaintiffs was consummated, and at Zenda a short time thereafter. It advertised its business in the Lake Geneva papers. Presumably the plaintiffs knew that the firm was selling flour and feed at the places named. If they did not, their business could not have been very seriously affected. Some eleven months after the business at Williams Bay was started, plaintiffs evidently supposed that the firm of Douglass & Dunn was

about to engage in business at Lake Geneva. They employed attorneys to write that firm and threaten suit in the event of such intent being carried out. No claim or assertion was made in that letter that any violation of the contract was claimed by reason of the business defendants were carrying on at Zenda and Williams Bay. On December 21, 1907, practically four years after the Williams Bay business was started, plaintiffs' attorney wrote another letter to *Horace G. Douglass,* stating in effect that one or more of the members of the firm of Douglass & Dunn were proposing to violate their contract by engaging in business at Lake Geneva under cover of the name of *Harold J. Douglass.* No claim was made that the firm of Douglass & Dunn breached its contract by engaging in business at any other point. In each instance in which anything was done to indicate that Douglass & Dunn contemplated starting a business at Lake Geneva, the plaintiffs were prompt to assert their contract rights. The fact that they did not do so as to other points, if they conceived that their rights had been infringed upon, is very significant. The inference was strong that this action was brought because plaintiffs believed that *Harold J. Douglass* was a dummy who in reality represented one or both of the members of the firm of Douglass & Dunn, and that the complaint in reference to the business at Williams Bay and Zenda was an afterthought. The course of conduct pursued by the parties is consistent with the view that each construed the word "vicinity" as not precluding the establishment of stores at Williams Bay and Zenda, and there is nothing established by the proofs in the case to indicate that such a construction of the contract was not correct.

It is by no means clear that the evidence of the witness *Dunn* was competent as to the definition of the word "vicinity," as used in the contract, given to the parties by the attorney who drafted such contract, and before it was signed. While evidence of surrounding circumstances and facts that

will place the court as nearly as may be in the position in which the parties stood when they made their contract is receivable to aid in the construction of an ambiguous contract, many cases hold that the rule does not go to the extent of permitting a party to testify to antecedent or contemporaneous oral agreements or conversations. *Johnson v. Pugh,* 110 Wis. 167, 170, 171, 85 N. W. 641; *Loree v. Webster Mfg. Co.* 134 Wis. 173, 177, 114 N. W. 449; *Hackley Nat. Bank v. Barry,* 139 Wis. 96, 120 N. W. 275; *Steele v. Schricker,* 55 Wis. 134, 12 N. W. 396; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 553, 93 N. W. 459; *Corbett v. Joannes,* 125 Wis. 370, 388, 104 N. W. 69; *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 415, 120 N. W. 277. On the contrary, there are a number of cases holding that such evidence is competent to explain an ambiguity in the writing. *Ganson v. Madigan,* 15 Wis. 144, unqualifiedly so holds, and there are many cases where the rule laid down in this case is cited with approval, of which *Weber v. Illing,* 66 Wis. 79, 83, 27 N. W. 834; *Becker v. Holm,* 89 Wis. 86, 91, 61 N. W. 307; and *Rib River L. Co. v. Ogilvie,* 113 Wis. 482, 487, 89 N. W. 483, are examples. Other cases involving facts similar to those in *Ganson v. Madigan* and the case at bar, and holding parol evidence admissible, are *Nilson v. Morse,* 52 Wis. 240, 9 N. W. 1; *Wenger v. Marty,* 135 Wis. 408, 411, 116 N. W. 7; and *Perkins v. Owen,* 123 Wis. 238, 101 N. W. 415. No case in this court assumes in express terms to overrule *Ganson v. Madigan,* and in no case which we have been able to find involving a state of facts similar to those presented by the case at bar has parol evidence been held incompetent. The parties here substantially agreed on the definition of an ambiguous term which occurred in their contract as drafted. Parol evidence to establish that fact does not alter their written contract, and neither does it add to it. It simply goes to show what the parties meant when they used the term "vicinity" and what the contract now in fact means.

Regardless of this evidence, however, and of the finding made thereon by the trial court, there is sufficient evidence in the case to sustain the finding of the court to the effect that neither the firm of Douglass & Dunn nor the individual members thereof engaged in business in the "vicinity" of Lake Geneva, particularly in view of the construction placed upon the contract by all the parties thereto.

By the Court.—Judgment affirmed.

PIERSON, Appellant, vs. CITIZENS' TELEPHONE AND TELEGRAPH COMPANY, Respondent.

November 15—December 7, 1909.

Master and servant: Negligence: Injury to servant using unsafe appliance by choice.

Where a telephone company had furnished, for use by its employees, a safe appliance for getting to any desired place on cables between poles, but they deliberately chose to use instead an appliance which was dangerous for that purpose, and an injury to one of them resulted from such use, the company is not liable for such injury.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action for personal injuries. The plaintiff was a lineman in the employ of the defendant corporation at Kenosha, and was injured while his fellow workmen were drawing him up by rope and pulley to a platform midway between the telegraph poles, where he was to investigate some difficulty in a cable. The pulley was attached to a tightly drawn messenger wire by means of a large steel hook which was "open"—*i. e.* had no lock or device by which it could be closed. The case has been here once upon an appeal from an order granting a

new trial (135 Wis. 73, 115 N. W. 336), and a statement of the facts will be found there which need not here be repeated. The action has been tried a second time and a special verdict rendered, by which the jury found (1) that the defendant furnished the hook for the use to which it was being put; (2) that the hook was not a reasonably safe appliance for that use; (3) that defendant was negligent in so furnishing the hook; (4) that such negligence was the proximate cause of plaintiff's injury; (5) that the plaintiff was not guilty of contributory negligence; (6) that he did not know that the hook was an open hook; (7) that he ought in the exercise of ordinary care to have known that it was an open hook; (8) that his injury was not caused by negligence of his co-employees; and (9) that his damages were $3,500. Upon motion the trial court changed the answers to the first, third, fourth, fifth, and eighth questions so as to reverse the jury's findings on these questions, and entered judgment for the defendant, from which judgment the plaintiff appeals.

Calvin Stewart and *Wallace Ingalls,* for the appellant.

For the respondent there was a brief by *Cavanagh & Barnes,* and oral argument by *C. D. Barnes.*

WINSLOW, C. J. It is undisputed that as the plaintiff was being hauled up by his fellow workmen the open hook jumped from the taut messenger wire by reason of the intermittent character of the pulling and thus caused the plaintiff's fall. It is also undisputed that the open hook was a dangerous instrumentality to use for the purpose for which it was here used, by reason of its liability to jump from the messenger wire when a heavy object like a human being was to be raised. On the other hand, it was a perfectly safe and proper instrument to be used when a light object, like a kit of tools, was to be raised. It is also undisputed that there was a perfectly safe way of getting to any place desired between the poles, and that way was to ascend the nearest pole and ride out on an

apparatus called a carrier or cable car to the place desired. The testimony shows that the company had one and probably two of these carriers at its storeroom at the time of the accident, and that the plaintiff and his fellow workmen could have taken a carrier for use had they so desired, but that they deliberately chose not to use it, and took instead the open hook and pulley, which they knew to be dangerous. Under these circumstances the trial court was manifestly right in holding that there was no negligence on the part of the defendant, because it had furnished for such purposes a perfectly safe appliance, to wit, the carrier, and was also right in holding that the plaintiff and his co-employees were guilty of negligence in deliberately choosing to use an appliance which was dangerous for the use intended, when the common employer had furnished a safe appliance which they were at liberty to take.

By the Court.—Judgment affirmed.

ILLINOIS STEEL COMPANY, Appellant, vs. WARRAS and wife, Respondents.

November 15—December 7, 1909.

Attorney and client: Authority: Stipulations: Validity: Setting aside: Discretion: Evidence: Laws of other states: Corporations: Power to hold property: Who may object.

1. The general retainer of an attorney in charge of litigation is sufficient to enable him in his honest judgment to control all matters of procedure in the action.
2. A stipulation in ejectment that defendant might amend his answer, without costs, after his strict right to do so had expired, and that each party might at the trial prove any title acquired after the commencement of the action, without a discontinuance and without payment of costs, amounted to a mere waiver of the procedure required by sec. 3074, R. S. 1878, and a balancing of the claims for costs (which in this case were nearly equal in amount), and was within the power of the attorneys

and binding upon the parties, irrespective of express consent or knowledge of the parties.

3. A stipulation cannot be attacked by defendant as lacking mutuality because signed for plaintiff by attorneys other than, and who had not been substituted for, the attorney who signed the summons, where it appears that the attorneys signing had, with consent of the original attorney and with knowledge of defendant's attorney, full authority from plaintiff to conduct the litigation, and had acted as his attorneys; also that the stipulation had been treated as effective by both parties and had been acted upon by defendant to his own advantage.

4. The discretion of the trial court to relieve parties from stipulations when improvident and induced by fraud, misunderstanding, or mistake, or when rendered inequitable by the development of a new situation, is a judicial discretion, to be exercised in the promotion of justice and equity. A stipulation relating to matters of procedure and having the essential characteristics of a mutual contract by which each party granted to the other a concession of some rights as a consideration for those secured, and which has been acted upon by the parties so that the *status quo* cannot be re-established as to one of them, should be set aside only in a plain case of fraud, mistake, or oppression.

5. It was not an exercise of judicial discretion to set aside a stipulation in ejectment under which defendant had been permitted to amend his answer without costs, and plaintiff was to have the right, without payment of costs, to prove title acquired after the beginning of the action, where defendant had enjoyed the rights so granted him for ten years, during which time defendant's after-acquired title was of record, and such action of the court would practically preclude the proving of such title and cause plaintiff's rights to the property to be barred by the statute of limitations.

6. In the absence of proof as to the law of another state, the court cannot take judicial notice that it differs from that of Wisconsin.

7. The objection that a corporation, foreign or domestic, has no power to hold title to property cannot be raised by a stranger claiming the property, unless, perhaps, such lack of power results from express statutory prohibition. If the acquiring of such property is merely *ultra vires*, it can be questioned only by persons directly interested in the corporation, or by the state.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

Ejectment to recover certain property on Jones Island, Milwaukee, commenced February 29, 1896. Plaintiff attempted to prove title deraigned from the government patent, but dependent upon certain conveyances from the heirs of Squire Alexander, made in May and October, 1896, subsequent to the commencement of the action and both on record by January 18, 1897. Objection being raised, plaintiff offered in evidence a stipulation dated March 15, 1897, whereby defendant was granted privilege to amend his answer without costs after a further extension of time and in an irregular manner, and agreeing that each of said parties might on said trial prove any and all title acquired at any time since the beginning of the action, without a discontinuance and without the payment of costs, in the same manner and with the same effect as though a compliance with sec. 3074, R. S. 1878, had been had. This stipulation, while declaring itself to be made by John H. Paul and Van Dyke, Van Dyke & Carter, attorneys for the plaintiff, and Rublee A. Cole, as attorney for defendant, was signed only by Van Dyke, Van Dyke & Carter and Mr. Cole. On April 5th following the defendant did serve and file amendments to the answer in reliance on such stipulation, such reliance being declared in the answer, which was duly verified personally by the defendant, and the stipulation was attached to the answer so served and filed, which answer was accepted and its service duly admitted by the Van Dyke firm as attorneys for the plaintiff. The original summons and complaint were signed by John H. Paul as plaintiff's attorney, and no formal substitution or entry of appearance had been made by the Van Dyke firm, although they had acted, and signed some papers, as plaintiff's attorneys prior to March 15th, and the defendant's attorney had been informed that they were the attorneys in charge of the litigation in case any defense was interposed. Upon the claim of the defendant that he never understood this stipulation and that Mr. Cole had no express authority from him to

make it, the court upon the trial made an order setting it aside and relieving the defendant from it, whereupon he excluded all conveyances made to the plaintiff subsequent to the commencement of the action, and at the close of the plaintiff's evidence rendered judgment of nonsuit, from which the plaintiff appeals.

For the appellant the cause was submitted on the briefs of *Van Dyke & Van Dyke, John H. Paul,* and *Theodore Kronshage,* attorneys, and *Kronshage, McGovern, Goff, Fritz & Hannan,* of counsel.

For the respondents there was a brief by *Fiebing & Killilea,* attorneys, and *Moritz Wittig* and *Henry J. Killilea,* of counsel, and oral argument by *Mr. Wittig.*

DODGE, J. The principal error assigned consists in relieving the defendant from the stipulation of March 15, 1907. That conduct is sought to be supported on the ground, amongst others, that such stipulation was beyond the power of the defendant's attorney. The powers of attorneys at law in charge of litigation are very broad, and while it may be that the general retainer is not sufficient to authorize an absolute surrender of substantive property rights which the attorney is employed to establish and enforce (*Fosha v. O'Donnell,* 120 Wis. 336, 97 N. W. 924), still it is and must be sufficient to enable the attorney in his honest judgment to control all matters of procedure in the action brought for such enforcement. Weeks, Attorneys (2d ed.) § 221; *Read v. French,* 28 N. Y. 285, 293. In this case the plaintiff had a clear and absolute right by statute (sec. 3074, R. S. 1878) to make proof of title and right to possession acquired subsequent to the commencement of the action, upon payment of the costs accrued up to the time of claiming such right, and, probably, upon some form of procedure sufficient to fairly notify defendant. Whether such procedure should be by notice, by application to the court, or by supplemental pleading is not now material

to declare. The effect of the stipulation as against defendant was merely to waive such procedure and such payment of costs in consideration, however, of plaintiff's waiver in the same stipulation of the right to insist on costs, in the discretion of the court, to be paid by defendant upon the granted privilege of amending his answer after his strict right so to do had expired. The defendant's costs, accrued up to the time of the stipulation, were obviously trifling. Substantially nothing had been done by the defense in the suit except to retain Mr. Cole and to serve an answer. We cannot doubt that such mere matter of procedure and of the balancing of claims to costs, especially where, as here, they must have been so nearly equal in amount, is within the power of the attorney at law employed to conduct the litigation, nor that his acts in such regard are binding upon his client independently of any express consent or even knowledge or understanding by the latter, and may safely be relied on by the antagonist and the court. *Walker v. Rogan,* 1 Wis. 597; *Clason v. Shepherd,* 10 Wis. 356; *Beach v. Beckwith,* 13 Wis. 21; *Blomberg v. Stewart,* 67 Wis. 455, 30 N. W. 617; *Bingham v. Winona Co.* 6 Minn. 136; *Emmons v. N. Y. & E. R. Co.* 17 How. Pr. 490; *In re Maxwell,* 66 Hun, 151, 21 N. Y. Supp. 209; *Leahy v. Stone,* 115 Ill. App. 138.

A contention is made, somewhat ambiguously, that the stipulation never came into effect or that it lacks mutuality, because not signed by John H. Paul, the attorney who signed the summons and for whom no substitution had been made. There are two answers to this contention: First, that it is fully established that the firm of Van Dyke, Van Dyke & Carter, with consent of Mr. Paul, had full authority from the plaintiff as its attorneys to conduct the litigation, and that defendant's attorney knew it; also that said firm had already taken some steps, and executed certain papers, in the procedure of the case as attorneys for plaintiff. *Walker v. Rogan, supra; King v. Ritchie,* 18 Wis. 554. Further, the stipula-

tion was treated as effective by both parties and was acted upon by the defendant promptly to his own advantage, for he exercised the right therein granted to file his amended answer without any application to the court and without payment of any costs, expressly declaring in said answer that it was so served and filed by virtue of the stipulation. Such right was recognized by the plaintiff as having been accorded by the stipulation. In such situation there can, of course, be no doubt either of the mutuality or completeness of the agreement.

The court, however, set the stipulation aside upon the expressly stated ground that on the defendant's part it had been improvidently made. We confess our inability to discover any improvidence. Beyond doubt, it was fully understood by defendant's attorney who was intrusted with discretion to make it. As already stated, it granted no new right to the plaintiff except absolution from a small amount of costs, and did that in acquisition to defendant of certainty of right to amend the answer without difficulty or formality, which at the time was at most a mere conditional privilege resting in the discretion of the court, upon the granting of which costs might properly have been imposed upon him. When to that is added the fact that defendant exercised the right so granted to him by the stipulation after due period for reflection and has rested upon that right for some ten years, we feel no hesitation in declaring the finding of improvidence in antagonism to all the disclosed facts.

While we of course recognize broad discretion in trial courts to relieve parties from stipulations and admissions when improvident and induced by fraud, misunderstanding, or mistake, or rendered inequitable by the development of a new situation, as in *Brown v. Cohn,* 88 Wis. 627, 636, 60 N. W. 826, yet that is a judicial discretion to be exercised in promotion of justice and equity and not in subversion thereof. Stipulations differ in their character. Some are mere admissions of fact simply relieving a party from the inconvenience

of making proof, and the setting aside thereof may place the parties in no worse position than they were when the stipulation was made. The agreement under consideration, on the contrary, was in all essential characteristics a mutual contract by which each party granted to the other a concession of some rights as a consideration for those secured. Such a contract is entitled to all the sanctity of any other, and when on the faith of it the parties have so acted in execution thereof that the *status quo* cannot be re-established as to one of them, it is only in a plain case of fraud, mistake, or oppression that the court should set it aside. Especially impregnable is such a contract when the one party thereto has received and enjoyed the fruits thereof, and the other, on the faith of it, has so changed his situation that he will be seriously and irremediably prejudiced. *Burnham v. Smith,* 11 Wis. 258; *Blomberg v. Stewart,* 67 Wis. 455, 30 N. W. 617; *Brown v. Cohn,* 88 Wis. 627, 637, 60 N. W. 826; *Garvin v. Crowley,* 116 Wis. 496, 93 N. W. 470; *Schroeder v. Klipp,* 120 Wis. 245, 97 N. W. 909; *Washburn v. Lee,* 128 Wis. 312, 107 N. W. 649; *Rogers v. Greenwood,* 14 Minn. 333; *Keogh v. Main,* 52 N. Y. Super. Ct. 160; *Slaven v. Germain,* 64 Hun, 506, 19 N. Y. Supp. 492; *Smith v. Barnes,* 9 Misc. 368, 29 N. Y. Supp. 692; *Thompson v. Ft. W. & R. G. R. Co.* 31 Tex. Civ. App. 583, 73 S. W. 29. In the instant case, as stated, defendant for ten years has enjoyed the rights granted him by the stipulation, during which time the conveyances now excluded have been of record. On the other hand, plaintiff, in reliance on the stipulation, has forborne to exercise its right under sec. 3074, which existed at the time of the making of the stipulation, and now cannot exercise it except by complying with that statute in paying all costs now accrued, which, obviously, from the record before us, are large in amount, probably approximating the value of the property in controversy. Further, as a result of the court's action in setting aside the stipulation and nonsuiting the plaintiff, its right, if any, in the property would become barred by statute of limitations pre-

cluding a new action. Such a result is grievously inequitable, and we are constrained to declare the action of the trial court so in disregard of mutual equities as not to constitute an exercise of judicial discretion, but to be arbitrary and unreasonable and therefore erroneous.

It is urged that, even were the stipulation not set aside, the judgment of nonsuit was proper because the plaintiff, being an Illinois corporation, is not competent to acquire or own this real estate, the law of Illinois not according such a corporation power to hold real estate beyond the needs of its general business. This contention might well be answered by the consideration that defendant has not proved the law of Illinois, and we cannot take judicial notice that it differs from that of Wisconsin. But a more complete answer is that inability of a corporation, foreign or domestic, to acquire title to any property cannot be raised by a stranger claiming the property unless, perhaps, such inability results from express statutory prohibition. Such merely *ultra vires* acts can be questioned only by persons directly interested in the corporation, or by the state, whose charter and franchises are exceeded or abused. *John V. Farwell Co. v. Wolf,* 96 Wis. 10, 70 N. W. 289, 71 N. W. 109; *Att'y Gen. ex rel. Askew v. Smith,* 109 Wis. 532, 541, 85 N. W. 512; *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 217, 94 N. W. 74; *Cowell v. Springs Co.* 100 U. S. 55; *Christian Union v. Yount,* 101 U. S. 352; *American B. Soc. v. Marshall,* 15 Ohio St. 537.

No question is raised or decided whether the excluded deeds, if in evidence, would *prima facie* establish title in plaintiff to the parcel in controversy. The rulings of the trial court are considered on the hypothetical assumption that they would do so, apparently made both by that court and by counsel here. The confusion of descriptions, and perhaps of grantors, is such that we should not undertake analysis of the surveys or the chain of title in absence of discussion.

By the Court.—Judgment reversed and cause remanded for a new trial.

HALWAS, Respondent, vs. AMERICAN GRANITE COMPANY, Appellant.

November 16—December 7, 1909.

Master and servant: Unsafe place to work: Pleading: Variance: Amendment: Evidence: Impeachment of witnesses: Cross-examination: Immaterial errors: Special verdict: Questions: Sufficiency: Proximate cause: Who are fellow-servants: Assumption of risk.

1. Under a complaint alleging that a large block of stone which plaintiff was lettering when it fell over and injured him had been negligently set up on the earthen floor of defendant's shop, evidence as to the condition of the ground where the stone stood was competent.
2. The rule that a party cannot impeach his own witness does not preclude him from showing that the testimony of any witness is incorrect or false in a matter material to the issue.
3. In an action for injuries caused by the falling of a large block of stone which plaintiff was lettering, it was not prejudicial error to exclude questions, asked him on cross-examination, as to whether he could think of anything that ought to have been done about the placing of the stone that was not done, whether he knew what was necessary to properly place stones, and whether, from what he noticed at that time as to the placing of stones to be lettered, the one in question needed bracing.
4. The negligence complained of in such action being the failure to furnish a safe place to work, and the defect not being obvious, defendant was not prejudiced by exclusion of questions, on cross-examination of a witness for plaintiff, as to whether blocks put under stones often shift and have to be replaced, and whether the craneman who placed the stones was not at times called to replace them. *Yezick v. Chicago B. Co.* 138 Wis. 342, distinguished.
5. It being alleged in the original complaint that the stone which fell and injured plaintiff was negligently erected "upon the earthen floor" of defendant's shop, and that it sunk the blocks upon which it rested into the earth so unevenly as to throw it out of plumb and cause it to fall, there was no error in allowing an amendment making the complaint read "upon the unsafe and unsuitable earthen floor."
6. It was not error in such case to refuse to submit to the jury at defendant's request a question as to whether there were other places in defendant's shop where the ground was reasonably

safe and where defendant's employees might have banked the stone,—the duty being upon defendant and not upon plaintiff to furnish a safe place.

7. A crane crew whose special duty it was to place in proper and safe position in defendant's shop the stones which were to be cut and lettered represented the master in providing a reasonably safe place for the cutters and letterers, and hence were not fellow-servants of a letterer who was injured by the falling of a stone upon which he was working, which had been insecurely set up by such crew without his taking any part in the setting thereof, although it appeared that the letterers called upon the crane crew to place the stones and in some cases, though not as a part of their duty, assisted the crew in that work.

8. The evidence in this case is *held* sufficient to show that the stone by which plaintiff was injured fell because it was not properly and safely put in position in view of the nature of the ground upon which it stood.

9. Plaintiff was not charged with the duty of inspecting the ground upon which the stone was placed and, it not being shown conclusively that he knew of the unsafe condition of the ground, and it not appearing that such condition was so obvious as to charge him with knowledge of the danger, he cannot be held as matter of law to have assumed the risk.

10. A special verdict finding that plaintiff was injured by the stone falling upon him; that the ground upon which the stone was placed was not reasonably safe; that the blocks upon which it rested were not of sufficient size to make them reasonably safe, considering the character of the ground; that defendant did not furnish plaintiff with a reasonably safe place to work; that defendant was guilty of want of ordinary care which was the proximate cause of plaintiff's injury; that there was no contributory negligence on the part of plaintiff; and assessing plaintiff's damages,—is sufficient to support a judgment for the plaintiff.

11. Such a verdict is not insufficient on the ground that it fails to show definitely what negligence the jury found to be the proximate cause of the injury, where no request was made for more specific findings upon that subject.

MARSHALL, J., is of the opinion that the decision should be based upon the fact that the working place furnished by defendant—meaning the ground selected, and not including the stone in position thereon—was not reasonably safe for the work in which plaintiff was engaged, and that it is unnecessary to decide whether or not the crane crew were fellow-servants of the plaintiff.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to recover for personal injuries. The plaintiff was in the employ of the defendant as a stonecutter, and at the time of the injury was engaged in lettering a monument or section thereof. The complaint alleges that at and prior to the accident the defendant's plant was provided with a traveling crane for lifting and moving from one part of the shop to another heavy stones and parts of monuments while in the process of manufacture; that a special gang of employees was engaged in this work under the supervision of the foreman, who acted for and in place of defendant; that it was the duty of the defendant to place such stones and monuments in a secure position and to maintain a safe place in which to work upon them; that the defendant erected the stone which caused the injury in such a negligent and careless manner upon the earthen floor of the shop upon blocks neither long enough nor large enough for a stone of such weight, viz., five or six tons; that said monument was not braced nor propped in any manner to keep it in position and prevent it from falling over; that it sunk said blocks into the earth so unevenly as to throw it out of plumb and cause it without warning to tip over onto plaintiff and cause the injury complained of; that after the stone was placed plaintiff was instructed to go to work thereon.

The answer denies generally the negligence of the defendant, and alleges assumption of risk on the part of the plaintiff, and specially denies that the crane mentioned in the complaint was operated by the craneman, assisted by a special gang of employees under the supervision of a foreman representing the defendant to move stones and parts of monuments while in the process of manufacture, or to place the same in position to be worked upon by stonecutters, and denies that such stones were placed in position by a special gang of men under the supervision of a foreman acting for the defendant, and denies that after the stone in question was placed plaintiff

was ordered to go to work upon it; and further alleges that, while the plaintiff did not assist in putting the stone in question in position, it was his duty and he was authorized to give instructions to the employees of defendant in relation to moving and setting up stones upon which he was working, and to give directions to prop or brace them in case they were not properly or securely set up, and that it was plaintiff's duty to assist employees of defendant in setting up stones to be lettered or cut and to give instructions to make them safe and secure.

The issues were tried and the following verdict returned:

"(1) Was the plaintiff injured on April 13, 1904, by a stone falling upon him, in the Russell avenue shop of the defendant? *A.* (by the court) Yes.

"(2) Was the ground on which the stone in question rested reasonably safe, considering the nature of the work in hand? *A.* No.

"(3) Were the blocks upon which the stone which fell rested of sufficient width and length to make them reasonably safe, considering the character of the ground and the nature of the work? *A.* No.

"(4) At the time of the injury to plaintiff, did the defendant furnish the plaintiff with a reasonably safe place to work, considering the nature of the work in hand? *A.* No.

"(5) Was the defendant guilty of a want of ordinary care which was the proximate cause of plaintiff's injuries? *A.* Yes.

(6) If you answer question numbered 4 'Yes,' then answer this question: Ought the plaintiff, in the exercise of ordinary care, to have known that the place at which he worked at the time of the injury was not reasonably safe? *A.* No.

"(7) Was the plaintiff guilty of any want of ordinary care which proximately contributed to produce his injuries? *A.* No.

"(8) If the court should be of opinion that the plaintiff is entitled to recover, at what sum do you assess plaintiff's damages? *A.* $4,500."

At the close of the plaintiff's evidence defendant moved for a nonsuit, and at the close of all the evidence for a directed

verdict, which motions were denied. After verdict the defendant made the usual motions for judgment on the verdict, for judgment notwithstanding the verdict, that the answers of the jury to the verdict be changed and the verdict amended, that the verdict be set aside, and for a new trial, all of which motions were denied and the motion of the plaintiff for judgment in his favor granted, and judgment was ordered in favor of the plaintiff. Judgment was entered in favor of the plaintiff accordingly for the sum of $4,500 damages found by the jury, and costs, from which this appeal was taken.

For the appellant there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

George E. Morton, attorney, and *C. H. Van Alstine,* of counsel, for the respondent.

The following opinion was filed December 7, 1909:

KERWIN, J. The evidence produced upon the trial tends to show that the plaintiff was in the employ of the defendant as a letterer and stonecutter in what was known as the Russell avenue shop, which is about 300 feet long north and south and from seventy-five to eighty feet wide east and west. The floor had been leveled by taking about six inches of the ground from the south end to the north with scrapers. The plaintiff at the time of the accident was engaged in lettering various sections of a large monument known as the Kosciusko monument. After completing the first die or section he proceeded to work upon the section which had been set up near the middle of the shop on the west side thereof by the craneman and his two helpers under the direction of a foreman of the shop about three days before the accident. The stone which fell and injured plaintiff had been placed upon blocks and was five feet ten inches wide, seven feet eight inches high, and twenty-two inches thick, and appeared to stand plumb and solid. Large stones like the one in question were raised and moved by a traveling crane operated by a craneman, who was

assisted by two others called "lumpers." The cutter or letterer gave directions when he wanted a stone placed in position, and if placed wrong the crane crew was signaled and the stones were changed according to his directions. When the foreman was not present the cutter often directed what blocks should be used, and his directions were obeyed, and he sometimes helped in the placing of the blocks. The crane traveled upon bridgework on supports and was used for moving stones about the shop. It traveled north and south and the carriage moved east and west. The ground where the monument stood was dark loam and soft, into which the front end of the east block supporting the monument had sunk from four to six inches. The place where the shop was located had been a cornfield, was without sod, and composed of sand and gravel at the south end. The duty of the crane crew was to set up monuments to be lettered. It consisted of the craneman, Tiett, and the "lumpers," Voss and Slack. Hempe was superintendent, and it was his duty to see that the letterers were kept busy at cutting or lettering, and it was the aim, so far as possible, to have the job ready for the letterers so they would lose no time between one job and another. It was no part of the plaintiff's duty to set up the stones. No stone had been known to fall over before the one in question fell. Stones were usually lettered while lying flat on the ground; but the one in question was standing for the reason that the letterer could not get around it as well if lying on the level. This stone was set up under the direction of the superintendent, Hempe, who selected the place where it was to stand and directed the work while being set; plaintiff not being present and having nothing to do with setting it. After it was set Hempe ordered plaintiff to go to work upon it. After it was set, Tiett, the craneman, spoke to Hempe, superintendent, and told him that he thought it would be better to place the stone up against the column base and brace it from the top; but Hempe said it was all right, and no more was said about it.

The stone was set on the west side of the building at about the center, the face to be lettered to the north. The plaintiff noticed nothing wrong with the setting of the stone.

Several errors are assigned by appellant which will be treated in the order presented.

1. The admission of evidence of one Lohr, respecting the condition of the ground where the stone stood, is complained of for incompetency under the pleadings. It will be seen from the statement of facts that the negligence complained of was the negligent and careless manner in which the stone had been set up in the shop. The allegations would seem to be broad enough to admit evidence of the character of the ground, since the question is involved as to whether the stone was properly set up so as to be safe. Moreover, the complaint was afterwards amended so as to make it more specific in this regard. The case appears to have been tried upon the theory that the ground upon which the stone stood was unsuitable and unsafe. Complaint is also made because the court permitted the plaintiff to deny certain statements made by Lohr, on the ground that plaintiff could not impeach his own witness and deny a fact drawn from Lohr. The rule that a party cannot impeach his own witness does not go to the extent of shutting the mouth of the party against whom a hostile witness testifies; but he may show that the evidence of any witness is incorrect or false in a matter material to the issue. *Richards v. State,* 82 Wis. 172, 51 N. W. 652; *Smith v. Ehanert,* 43 Wis. 181; *Kohl v. Bradley, Clark & Co.* 130 Wis. 301, 110 N. W. 265. We find no error under this head.

2. The plaintiff was asked the following questions on cross-examination:

"*Q.* Can you think of anything now, from what you saw there, that ought to have been done about the placing of this stone that was not done?

"*Q.* Do you know what is necessary to properly place or put up stones?

"*Q*. From what you noticed at that time about the placing and putting up of stones to be lettered, such as this stone was which you were asked to letter, did it need bracing?"

Objection to the first question was sustained on the ground that it was improper in form and argumentative, and to the other two on the ground that they were not proper cross-examination. Without entering into any discussion upon these rulings, it is sufficient to say that we find no prejudicial error in the ruling below. Nor do we find any prejudicial error in the rulings sustaining objections to questions asked plaintiff's witnesses Berlick and Voss on cross-examination. While the evidence of Berlick was, when first offered, excluded, it was afterwards, in substance, admitted. Moreover, the court intimated that such evidence might be proper in defense; but it was not offered by defendant in making its case. The questions put to Voss and ruled out could not have prejudiced the defendant. They inquired whether blocks put under stones often shift and have to be replaced, and whether the craneman was not at times called to replace the stones. Appellant relies on *Yezick v. Chicago B. Co.* 138 Wis. 342, 120 N. W. 247; but in that case it will be seen that the defect was open and obvious and the court held that plaintiff assumed the risk. In the instant case the negligence complained of is failure to furnish a safe place, and the defect was not open and obvious. As to the ruling complained of respecting the evidence of the witnesses Seitz and Rathman, no prejudicial error was committed.

3. Error is assigned in allowing an amendment to the plaintiff's complaint. It is at least very doubtful whether the amendment was necessary, but, if so, it was properly allowed. The original complaint alleged that the stone in question was negligently erected upon the earthen floor of the shop, and that the stone sunk the blocks upon which it rested into the earth so unevenly as to throw it out of plumb and cause it to fall. The plaintiff moved to amend by inserting the words "unsafe

and unsuitable," so as to make it read "upon the unsafe and unsuitable earthen floor." There was no error in allowing the amendment. *Miller v. Aram,* 37 Wis. 142; *Jarvis v. N. W. M. R. Asso.* 102 Wis. 546, 78 N. W. 1089; *Post v. Campbell,* 110 Wis. 378, 85 N. W. 1032; *Robinson v. Eau Claire B. & S. Co.* 110 Wis. 369, 85 N. W. 983.

4. Error is assigned in refusing to submit the following question to the jury:

"Were there other places in the defendant's shop than the place where the stone in question was set, where the ground was reasonably safe, considering the nature of the work in hand, and where the employees of the defendant might have banked the stone in question?"

There was no error in refusing to submit this question. The issues in the case were fully covered by the verdict submitted. Even if submitted and answered in the affirmative it would not have strengthened the defendant's case. The duty resting upon the defendant was to furnish a safe working place. The facts in the instant case do not bring it within the rule of the case cited by appellant. *Van den Heuvel v. Nat. F. Co.* 84 Wis. 636, 54 N. W. 1016. No duty rested upon the plaintiff here to furnish a safe place. That duty was upon the defendant. *Eingartner v. Ill. S. Co.* 94 Wis. 70, 68 N. W. 664; *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48; *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525, 110 N. W. 409.

5. It is further contended that there is no evidence proving or tending to prove that the defendant was guilty of any want of ordinary care which was the proximate cause of the plaintiff's injury. This contention is based upon the theory that the plaintiff and the other employees who set up the stone were engaged in a common enterprise and were therefore fellow-servants. A great many decisions of this court are cited by appellant upon this proposition. We shall not attempt to

discuss the numerous cases referred to by appellant. They all go to the general proposition laid down in the books that:

"To constitute fellow-servants it is not necessary that the negligent workmen causing the injury and the one injured should both be engaged in the same particular work. It is sufficient if they are employed by the same master, under the same control, and performing the duties and services for the same general purpose." *MacCarthy v. Whitcomb,* 110 Wis. 113, 85 N. W. 707.

The difficulty is not so much with the rule of law as with the application of it. There is quite a diversity of opinion among courts as to who constitute fellow-servants. In this state the rule is well settled that who constitute fellow-servants does not depend upon the grade or rank of the servant whose negligence caused the injury, but upon the nature of the service being performed by the servants in which the negligence occurs. *Wiskie v. Montello G. Co.* 111 Wis. 443, 87 N. W. 461; *Rankel v. Buckstaff-Edwards Co.* 138 Wis. 442, 120 N. W. 269. We have the well-recognized rule in this state that, after the safe place and safe appliances are furnished by the master, servants engaged in common pursuit under the same general control in carrying out details respecting the work of operating the machinery may be fellow-servants. A familiar illustration of this rule is found in *Okonski v. Pennsylvania & O. F. Co.* 114 Wis. 448, 90 N. W. 429, cited by appellant. To the same effect is *Miller v. Centralia P. & W. P. Co.* 134 Wis. 316, 113 N. W. 954, where the master had fully performed his duties in furnishing all appliances necessary for lighting the mill, and the negligence consisted in turning off the light and thereby rendering the place dark and unsafe. Such negligence was held that of a fellow-servant who was engaged in a customary operative detail, and therefore his negligence was not the negligence of the master in failing to furnish a safe working place. *Williams v. North Wis. L. Co.* 124 Wis. 328, 102 N. W. 589. We think the present case is not ruled by the authorities above cited and relied upon by ap-

pellant. The plaintiff was not engaged in a common employment with the crane crew, nor was the work of setting large stones in position for the letterers to work upon a mere operative detail. When a master has performed his duty in furnishing a reasonably safe place, reasonably safe appliances, competent co-employees, and given proper warning of latent dangers, he may, doubtless, commit to the employees the details of the work; but he cannot escape the duty of furnishing a reasonably safe place and reasonably safe appliances by intrusting such duty to another. *Williams v. North Wis. L. Co., supra.* The doctrine that the duty rests on the master to furnish a reasonably safe working place, and that such duty cannot be delegated, has been so often declared, discussed, and applied by this court that nothing further need be said upon the general rule. *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269; *Jarnek v. Manitowoc C. & D. Co.* 97 Wis. 537, 73 N. W. 62; *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48; *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525, 110 N. W. 409.

Upon the established facts we think it clear that the crane crew and the plaintiff were not fellow-servants. The crane crew represented the master in providing a reasonably safe working place for the cutters and letterers, of which the plaintiff was one. True, the crane crew was called upon by the letterers to place the stones for them; but the special duty of the crane crew was to place the stones in proper and safe position. While in some cases it appears that the letterers assisted in setting the stones, it does not appear to have been any part of their duty, and in the instant case plaintiff took no part whatever in setting the stone which fell upon him causing the injury. The jury found upon sufficient evidence that the ground upon which the stone stood was not reasonably safe, nor the blocks upon which the stone rested of sufficient width and length to make them reasonably safe, considering the character of the ground and the work, and that the defendant

did not furnish the plaintiff with a reasonably safe place to work. It is therefore established that the defendant failed in its duty to furnish a reasonably safe working place. The instant case comes fairly within the doctrine of numerous cases in this court, and especially within the rule laid down in *Cadden v. Am. S. B. Co.* 88 Wis. 409, 60 N. W. 800; *Eingartner v. Ill. S. Co.* 94 Wis. 70, 68 N. W. 664; *Jarnek v. Manitowoc C. & D. Co.* 97 Wis. 537, 73 N. W. 62; and *Lipsky v. C. Reiss C. Co.* 136 Wis. 307, 117 N. W. 803.

In *Cadden v. Am. S. B. Co., supra,* the plaintiff was injured while working as a riveter by reason of the improper and dangerous manner in which a scaffold had been suspended. The scaffolding was supplied by the defendant and placed in position by men employed by defendant for that purpose, and the riveters took no part in constructing the scaffold, rendered no assistance, and gave no directions, except to indicate where it should be placed, and it was held that the scaffold builders were not fellow-servants with the plaintiff. At page 419 of 88 Wis. (60 N. W. 802) the court said:

"But, under the finding, it is clear that the plaintiff was not to have, and did not have, anything to do with placing the scaffold, but that this duty was devolved on the defendant, and whether by custom or by agreement is not material. The fact that the plaintiff was to indicate where it was to be placed, or had a right to object that it was not properly suspended or adjusted, does not affect the result. He certainly had a right to call on the defendant to do its duty, and to object that it had not been properly performed. Under the facts found, in view of the duty of the defendant to suspend and adjust the scaffold properly, it became, in our opinion, a place, as distinguished from a mere appliance, which the defendant was bound to furnish the plaintiff, though changing in location with the exigencies of the work; and it was its duty to see that it was in a reasonably safe and proper condition to enable the plaintiff to work thereon. The plaintiff did not take the risk of the carelessness of those who were selected by the defendant and undertook to do its duty, even though they

were the servants of the same master. This view of the case is in accordance with former decisions of this court and a great preponderance of authority."

In *Eingartner v. Ill. S. Co.* 94 Wis. 70, 68 N. W. 664, this court held that a "carpenter gang," whose duty it was to replace planks about a machine after their removal for the purpose of attaching new rolls, were not fellow-servants of one employed to oil the machinery, and the negligence of such carpenter gang in replacing the planks was the negligence of the master. At page 79 of 94 Wis. (68 N. W. 667) this court said:

"When the master undertakes to furnish the servant a place to work, with the preparation of which place the servant has nothing to do, then it is the master's duty to furnish a reasonably safe place to work, and this duty cannot be delegated; and the servant who prepares such place for work is not, in the eye of the law, a fellow-servant with the other."

It is further insisted by counsel for appellant that there is no proof showing what caused the stone to fall; but, as we have seen, it was the duty of the defendant to set the stone in a reasonably safe position, and there is ample evidence to support the finding that it did not do so. It appears that the block upon which the stone rested sunk several inches into the ground, and, moreover, the craneman notified the foreman that the stone was not securely set up. The cause of the fall cannot be said to be one of conjecture, even if this were sufficient to defeat the plaintiff; but, on the contrary, there is ample evidence that the stone fell because not properly and safely put in position in view of the condition of the ground upon which it stood. *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525, 110 N. W. 409; *Lipsky v. C. Reiss C. Co.* 136 Wis. 307, 117 N. W. 803. Nor can it be said as matter of law that the plaintiff assumed the risk. The shop in which the accident occurred was a new shop, and it does not appear that the plaintiff was so familiar with the character of the soil constituting the floor that we can say as matter of law that he knew the danger of setting the stone on the blocks in the man-

ner in which it was set. There was evidence that parts of the ground in the shop were soft, while other parts were much harder and substantial. The plaintiff was not charged with the duty of inspection, and it does not appear that the defective and unsafe condition of the ground was so obvious as to charge him with knowledge of the danger. *Chopin v. Combined L. P. Co.* 134 Wis. 35, 114 N. W. 95. The jury found that the plaintiff was not guilty of any want of ordinary care which proximately contributed to produce his injury, and such finding is supported by the evidence.

The appellant further complains of the verdict for insufficiency, but we cannot see, under the rules laid down by this court, that it is subject to the criticism. *Deisenrieter v. Kraus-Merkel M. Co.* 92 Wis. 164, 66 N. W. 112; *Howard v. Beldenville L. Co.* 134 Wis. 644, 114 N. W. 1114; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816.

Complaint is made that the findings of the jury leave in doubt what negligence the jury found to be the proximate cause of the injury. The defendant made no request to find as to the question, except as to question No. 2½ heretofore considered. If counsel for defendant desired more specific findings upon proximate cause it should have asked them. The verdict is set out in the statement of facts and is sufficient to support the judgment, especially in view of sec. 2858*m*, Stats. (Laws of 1907, ch. 346), and the repeated decisions of this court. *Bates v. C., M. & St. P. R. Co.* 140 Wis. 235, 122 N. W. 745. We regard further discussion under this head unnecessary.

We find no prejudicial error in the record.

By the Court.—The judgment of the court below is affirmed.

The following opinion was filed December 21, 1909:

MARSHALL, J. The vital question is, Did appellant furnish respondent a reasonably safe place to work? The jury

found in the negative, I understand, because the ground selected was unsuitable. The master furnished that. There is no doubt about it. The working place did not include the ground with the stone in position ready for the lettering. The effort to support the judgment on the theory that it did, and that the crane crew in placing the stone in position were not fellow-servants of respondent, because they, in so doing, were performing the work of the master, was unnecessary and it seems illogical.

After correctly stating the rule that all servants of a common master, regardless of rank or grade, engaged—some in one department and some in another, some at one detail of the work and some at another—to accomplish a common object, are fellow-servants, the application to the facts seems quite forced. Were not the crane crew and the respondent under the same general control, working to accomplish the general object of bringing new material onto the premises, manufacturing the same into finished products, and removing the same as shipments occurred? Why was not the placing of a stone in position, lettering it, and bringing it upon the ground to be lettered, all details of the general work in which all were engaged? Does this case not carry the doctrine of *Cadden v. Am. S. B. Co.* 88 Wis. 409, 60 N. W. 800, and similar cases, in view of *Wiskie v. Montello G. Co.* 111 Wis. 443, 87 N. W. 461, and similar cases, so far as to turn the fellow-servant law into much confusion? It was as much the duty of appellant to use reasonable care to keep respondent's working place reasonably safe as it was to furnish it. Therefore, according to the logic of the opinion, if the crane crew, or the crew bringing stone to the premises or taking away finished products, had so conducted themselves while respondent was doing his work as to render his working place unsafe, such conduct would have been that of the master.

The real cause of the mischief was the negligence, if there were any as the jury found, in furnishing the unsuitable ground upon which to do the work. Such being the case, why

endeavor to support the judgment against the claim of appellant that the crane crew were fellow-servants of respondent in the work of preparing the stone, by claiming that they were not because they were merely preparing the working place? If that be so, how could we avoid holding, if the stone had fallen from the trucks while being brought to the place where the cranemen found it, and injured respondent, that such truck crew were not fellow-servants?

It seems the case should have been grounded, as it was wholly by the verdict, on the proof that the working place, referring to the ground, was not reasonably safe for the operation respondent was engaged in.

BORCHERT, Special Administrator, Respondent, vs. BORCHERT and others, Executors, Appellants.

November 17—December 7, 1909.

Contracts: Rescission: Joint wrongdoers: Death of one: Judgment against representatives: Form: Necessary parties.

1. In an action for rescission of an executed contract induced by fraud and undue influence, where one of the defendants dies and his executors are substituted, the court should find what part, if any, of the money or property wrongfully taken under the contract was received by the deceased wrongdoer, and judgment may be rendered against the executors for that amount only, with an express direction that it be collected only out of their testator's estate.
2. The executors in such a case are necessary parties to the action so far as it seeks to rescind or annul a contract to which their testator was a party, but the judgment, if any, against them should be *de bonis testatoris*, not *de bonis propriis*.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Modified and affirmed.*

For the appellants there was a brief by *Houghton, Neelen & Houghton,* and oral argument by *F. W. Houghton.*

For the respondent there was a brief by *Rubin & Zabel,* and oral argument by *W. C. Zabel.*

TIMLIN, J. This action was before the court on demurrer to the complaint and is reported in 132 Wis. 593, 113 N. W. 35. After remand the case was tried and the court below made findings of fact, from which it appeared that Wilhelmine Borchert died April 5, 1906. Her husband, Wilhelm Borchert, died October 1, 1906. The plaintiff was appointed special administrator of the estate of Wilhelmine Borchert on October 25, 1906, and brought the action to rescind the contract executed February 20, 1906, by Wilhelm and Wilhelmine Borchert to *Fred Borchert* and Anna, his wife, for the support by the latter of the former in consideration of a conveyance of the property of the former, and also to recover back that property. It was found that Wilhelmine, on and prior to February 20, 1906, owned household furniture of the value of $100, a certain lot, afterward and during her lifetime sold by her for $400, and a mortgage for the amount of $1,100. But her entire estate was in all of the value of $1,500. The lot must therefore have been sold for $100 more than its real value. It was also found that at the time of the execution of this contract and the transfer of the property in consideration thereof, Wilhelmine Borchert was about seventy-eight years of age and incapable and incompetent to conduct any transactions of her own free will and understanding or to resist any undue influence or persuasions. *Fred Borchert* and Anna, his wife, by means of undue influence, solicitation, and persuasion, induced the making of the contract and the transfer of the property from Wilhelmine. The mortgage held by Wilhelmine was upon certain property conveyed by her to *Louis Borchert,* the plaintiff, and *Louis* paid this mortgage to *Fred* in March, 1906, before the death of Wilhelmine,

and *Fred* also received the avails of the lot sold. After making the contract *Fred Borchert* and Anna, his wife, furnished Wilhelmine and Wilhelm Borchert support, paid funeral expenses, erected a monument, disbursed money for medical attendance and medicine, in all amounting to $550.25. The court concluded that the contract of support should be rescinded, and the property transferred or money received in consequence of such transfer should be recovered by the administrator, subject to a reduction by said sum of $550.25. Anna Borchert died pending the litigation, and the defendants *Louis Kandler* and *Fred Borchert* were on November 8, 1907, duly appointed executors of her estate, and by order of the circuit court substituted as defendants in this action in place of Anna Borchert, deceased. Conclusion of law "that the plaintiff therefore have judgment against the said defendants for the sum of $1,600, with interest thereon, with the costs and disbursements of this action, less the sum of $550.25 allowed said defendants, as hereinbefore stated, and that the agreement hereinbefore set forth be canceled, set aside, and declared null and void." The judgment followed this finding and adjudged "that the defendants pay to plaintiff the sum of $1,369.33."

It is vigorously contended that the finding of mental incapacity and undue influence is not supported by evidence. We have examined the evidence with great care and cannot uphold this contention with respect to the mental incapacity of Wilhelmine. The plaintiff is special administrator of the estate of Wilhelmine Borchert and asserting her rights and not those of Wilhelm. She owned the property transferred, although her husband, Wilhelm, was a party to the contract. The incapacity of Wilhelmine is therefore the principal inquiry rather than the incapacity of Wilhelm. We cannot undertake to restate the evidence. It is not clear nor positive in many respects, but there seems to be sufficient to support the finding of the trial court in this respect. It requires quite a

strong case of lack of evidence to induce this court to reverse a finding of the trial court which apparently proceeds on no mistake of law, and it is not sufficient that the evidence appears to us to have warranted a different conclusion.

But the judgment against the executors of Anna Borchert is clearly error. The judgment is in form *de bonis propriis,* and could be all collected out of the individual property of the executors. In such case, where two persons jointly commit a tort, fraud, or wrong, and the right of action therefor survives, and afterwards one of these wrongdoers dies and his executor or administrator is substituted as defendant, the judgment at law cannot ordinarily be a joint one against the surviving wrongdoer and the executor or administrator of the other wrongdoer, deceased. In a suit in equity for rescission like this the court should find what part, if any, of the money or property wrongfully taken was received by the deceased wrongdoer, and judgment may be rendered against the executor or administrator only for such amount with express direction that it be collected only out of the estate represented. *Ladd v. Anderson,* 58 Wis. 591, 17 N. W. 320, and cases cited; and see *Eisentraut v. Cornelius,* 134 Wis. 532, 115 N. W. 142, and *Limited Inv. Asso. v. Glendale Inv. Asso.* 99 Wis. 54, 74 N. W. 633. There is no evidence that Anna Borchert, deceased, received in her lifetime any of the money or property in question. Her executors were necessary parties to the action, so far as the action sought to rescind or annul the contract to which she was a party, and a judgment *de bonis testatoris* against them would have been proper for such amount as the evidence showed had come into her hands, but not this form of judgment.

The evidence shows that the money and property in question, the consideration of the rescinded contract, was received by *Fred Borchert,* her codefendant. Consequently the judgment of the circuit court must be modified to the extent that the repayment of the sum there awarded be made by *Fred*

Borchert alone, and the executors defendant be also relieved from their liability for costs of the court below, under the rule of *Ladd v. Anderson, supra,* and in other respects affirmed.

By the Court.—The judgment of the circuit court for Milwaukee county is modified so that the same shall constitute a judgment against *Fred Borchert* for damages and costs there stated, and not against the executors or either of them for any sum, and as so modified it is affirmed. The respondent shall recover usual costs in this court, except clerk's fees, against *Fred Borchert,* and the executors shall recover costs of this court against respondent, consisting of the usual attorney's fees, the cost of printing brief, and the fees of the clerk.

PANKOPF, Respondent, vs. HINKLEY, Appellant.

November 17—December 7, 1909.

Negligence: Proximate cause of injury: Fright or shock.

1. When physical injury flows directly from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured person, such fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow.

[2. Whether, in a complaint alleging that through defendant's negligence plaintiff received "a severe fright and shock" and that a miscarriage resulted therefrom, the word "shock" is used to mean a physical or a mental disturbance, or as meaning a condition partaking of both, not determined.]

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Edgar L. Wood, for the appellant.

For the respondent there was a brief by *Julius E. Kiefer,* attorney, and *Gross & Saltzstein,* of counsel, and oral argument by *E. J. Gross.*

WINSLOW, C. J. This is an action for personal injuries resulting from negligence. A general demurrer to the complaint having been overruled, the defendant appeals. The complaint in brief charges that, while the plaintiff was riding in a hired carriage upon a country highway with several other people, an automobile driven by the defendant came up behind the carriage, and the driver of the carriage turned out to the extreme right side of the road and stopped in order that the automobile might pass by; that, although there was ample room to pass, the defendant, in attempting to pass, negligently and carelessly steered the automobile directly into the horses attached to the carriage, with such force that the horses were thrown or pushed off from the road, pulling the carriage with them with such force and violence that the plaintiff and the other occupants of the carriage received "a severe fright and shock; that due to such fright and shock, as aforesaid caused by the negligence of the defendant, the said plaintiff suffered injury to her body; that at the time she was pregnant, and as a result of said fright and shock there resulted a miscarriage," causing severe pain and suffering, and resulting in permanent injury to her health.

It is plain from the language of the complaint that this is an action to recover damages for physical injuries, namely, the miscarriage and its subsequent consequences, and is not an action to recover damages for mere mental anguish, which is not preceded by or accompanied with some physical injury. Hence the doctrine that there can be no recovery in this latter class of cases, first announced in *Summerfield v. W. U. Tel. Co.* 87 Wis. 1, 57 N. W. 973, and affirmed in *Gatzow v. Buening,* 106 Wis. 1, 20, 81 N. W. 1003, and subsequent cases, is not at all involved nor affected by anything which may be said in this case.

The word "shock" has a number of meanings. It may mean the collision or concussion of two physical bodies striking together, or it may mean simply a surprised or disgusted state of the emotions which momentarily disappears. In the

present case perhaps it might properly be construed as meaning a physical jolt given to the person of the plaintiff as the carriage was suddenly pulled or pushed off from the highway. From the allegations of the complaint it seems well-nigh certain that there must have been some jolt of this kind. However, it seems evident to us that the pleader did not use the term as meaning external violence or physical inconvenience, but rather in its pathological sense, meaning an abnormal condition, either of mind or of body, or of both mind and body, resulting from the imminent apparent danger of injury or death, which suddenly flashed upon the vision of the plaintiff. The Century Dictionary defines "shock" used pathologically as follows:

"A condition of profound prostration of voluntary and involuntary functions, of acute onset, caused by trauma, surgical operation, or excessive sudden emotional disturbance (mental shock)."

Whether a condition of profound prostration of both voluntary and involuntary functions of the body be not as truly a physical injury when produced by violent emotional disturbance as when produced by bodily violence would perhaps be an interesting question, but we do not find it necessary to consider it.

It is charged that the shock was directly caused by the defendant's negligent act, and that the miscarriage was directly caused by the shock. Now, if the shock can legally operate as the connecting link between the defendant's negligent act and the plaintiff's miscarriage, so that the negligence was truly the cause which operated first and set in motion the train of events which ended in the miscarriage as the natural and probable result, then it does not become necessary to decide whether "shock" as here used is a physical or mental disturbance, or whether, as seems more reasonable, it partakes of both. This court in a number of cases seems to have settled this question in the affirmative, though without extended discussion of this phase of the question. These cases are *Oliver*

v. La Valle, 36 Wis. 592; *Stutz v. C. & N. W. R. Co.* 73 Wis. 147, 40 N. W. 653; *McKeon v. C., M. & St. P. R. Co.* 94 Wis. 477, 69 N. W. 175; *Morey v. Lake Superior T. & T. Co.* 125 Wis. 148, 103 N. W. 271. In none of these cases did the negligent act of the defendant, which was relied on as the proximate cause of the subsequent physical injuries, consist of a physical violence or hostile contact, but only consisted of a negligent or wrongful act which produced extreme fright or shock, from which extreme fright or shock physical injuries naturally resulted; but in all of the cases the chain of causation was held to be complete in case the jury found that the defendant should have anticipated that an injury to another might follow as the natural and probable result of his negligent act. It is true that there is a conflict in the authorities upon this question, but we think the better reason supports the rule which this court has consistently followed. *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 50 N. W. 1034; *Sanderson v. N. P. R. Co.* 88 Minn. 162, 92 N. W. 542; *Gulf, C. & S. F. R. Co. v. Hayter,* 93 Tex. 239, 54 S. W. 944; *Sloane v. S. C. R. Co.* 111 Cal. 668, 44 Pac. 320; *Mack v. S. B. R. Co.* 52 S. C. 323, 29 S. E. 905; *Bell v. G. N. R. Co.* 26 L. R. (Ir.) 428; *Dulieu v. White,* [1901] 2 K. B. 669; *Fitzpatrick v. G. W. R. Co.* 12 U. C. Q. B. 645. *Contra: Victorian Railways Comm'rs v. Coultas,* L. R. 13 App. Cas. 222; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 45 N. E. 354; *Ewing v. P., C. & St. L. R. Co.* 147 Pa. St. 40, 23 Atl. 340; *Spade v. L. & B. R. Co.* 168 Mass. 285, 47 N. E. 88. An exhaustive and learned article on the subject which reviews the authorities may be found in 41 Am. Law Reg. N. S. 141.

The principle here decided is that when physical injury flows directly from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured person, such fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow.

By the Court.—Order affirmed.

WADHAMS OIL COMPANY, Appellant, vs. TRACY, State Supervisor of Inspectors of Illuminating Oils, Respondent.

November 17—December 7, 1909.

Equity: Jurisdiction: Enjoining enforcement of statute: Constitutional law: Police power: Inspection of oils: Excessive fees: Pleading: Demurrer: Issues of fact: Interstate commerce: State auditor: Payments without audit.

1. It is competent for a court of equity to entertain an action commenced by a person, specially interested, against administrative officers to enjoin them from executing a law, upon the ground of its being unconstitutional, when such person would otherwise be irremediably damaged.
2. The question of equity jurisdiction relates, technically, to power itself, but in the broader sense, when such power should or should not be used.
3. Courts of equity should, as a rule, decline to exercise jurisdiction, though having it, to enjoin public officers from executing the legislative will as to mere minor features of an enactment, not essential to efficacy of the general and dominant features.
4. Reasonable legislative regulations regarding the adaptability of things placed on sale for human consumption, such as the products of mineral oil, and the proper keeping and handling thereof; for the prevention of fraud, are as well within sovereign police authority, as such regulations for conservation of public safety.
5. A legislative enactment under the police power cannot be condemned as a taxing measure and out of harmony with the constitutional rule of uniformity in that regard, unless the fees exacted are so clearly excessive, that the legislature could not reasonably have had in contemplation an equivalent for the mere expense of executing the law.
6. An allegation in a complaint, challenging the legitimacy of an ostensible police regulation on the ground that the fees provided for are so large as to show, clearly, that the object thereof was revenue, does not tender an issue of fact for confession or denial by the adverse party, when it can be clearly seen from the face of the pleading, in the light of common knowledge and established judicial rules, that the fees are within reason as mere expenses of executing the law.
7. A valid police regulation is not subject to successful attack under the commerce clause of the national constitution.
8. Disbursements of money from the state treasury must be preceded by an audit by the secretary of state.

9. A legislative enactment, so far as it authorizes payment of money out of the state treasury without constitutional audit, violates sec. 2, art. VI, Const., making the secretary of state *ex officio* state auditor.

[Syllabus by MARSHALL, J.]

APPEAL from orders of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to enjoin execution of ch. 363, Laws of 1909, upon the ground that it is unconstitutional. A temporary injunction was granted on a verified complaint. There was a demurrer for insufficiency and a motion to vacate the injunction. The former was sustained and the latter granted. The appeal is from both orders.

The complaint, among other things, stated, that plaintiff is a Wisconsin corporation, engaged, in this state, in dealing in products of petroleum, including kerosene oil, gasoline, benzine and naphtha; for illuminating, heating, and power purposes; all of which are subjects of interstate commerce, and are brought into this state to supply trade in which plaintiff is engaged; that defendant and his assistants, as state agents, under pretended authority of the legislative enactment mentioned, will, unless judicially prevented, interfere with plaintiff's business, to its great pecuniary and irremediable detriment; that the act violates art. I, sec. 1, art. I, sec. 13, art. I, sec. 22, art. IV, sec. 18, art. VI, sec. 2, and art. VIII, sec. 1, of the state constitution; also art. I, sec. 8, art. I, sec. 10, of federal constitution, and arts. V and XIV of amendments to the federal constitution; that the inspection fees are exorbitant and the act, generally, is unreasonable and indefinite.

The material interferences authorized by the act are as follows:

(1) All products, mentioned in the act, sold in this state for illuminating or heating purposes, shall be inspected by the state agents, mentioned, under such rules as the chief agent may make, consistent with the provisions of the act.

(2) All packages or inclosures shall be marked so as to evi-

dence the inspection and under such rules as to prevent such evidence being used a second time.

(3) The inspection fees shall be deposited in the state treasury and devoted wholly to expense of the inspection department.

(4) Every product of which petroleum, or any product thereof, forms a constituent part, shall, before being offered for sale in this state for illuminating or heating purposes, be inspected and marked as provided.

(5) Gasoline and like products of petroleum need only be inspected as to specific gravity, the result in each case to be stamped on the package or inclosure, provided, however, that such products, when sold or delivered in bulk from a tank wagon, need only be safeguarded by the wagon having thereon the character of the product delivered therefrom, as indicated in the act.

(6) The standard of test shall be as indicated, and shall be made, promptly, when demanded, and the fee therefor shall be paid by the demandant at ten cents per cask, barrel, package, or sample. In case of the products being in large inclosures there shall be a fee as for barrel lots of fifty gallons.

(7) Illuminating oil shall be tested for temperature at which it will emit a combustible vapor and burn freely, and gasoline and like products of petroleum for their gravity, and if found to satisfy statutory requirements, shall be marked over the signature of the tester, if oil, "approved for illuminating, heating or power purposes;" and if such other products, the specific gravity, specifying the district and date of the test; and a certificate shall be issued by the tester, containing stated specifications. All products, not meeting the required test, shall receive a specified mark of condemnation.

(8) The inspector shall have authority to enter any private premises of any manufacturer, refiner, or vendor of products requiring inspection, and make the proper test and marking of any such product found not to have been so tested and marked,

and examine the books and records of the parties for purposes of discovery.

(9) Any shipment in a tank shall be inspected before unloading, provided the delay shall not be over twenty-four hours, in which case the testing may be done after unloading. In case of inspected oils being placed in stationary tanks, no other inspection shall be necessary, but the tank shall be duly marked by the inspector as provided.

(10) In case of oils, after having been inspected, being shipped out of the state, the inspector's fees shall be returned.

(11) In case of shipment into the state of inspected oils, from points where the standards are the same as here, upon payment of the fees, the inclosures may be duly marked without retesting.

(12) All retailers of gasoline or any similar product shall make deliveries in barrels or small designated inclosures, painted vermilion red, with a specified designation stenciled in English thereon. No such dealer shall make deliveries of kerosene in like manner.

(13) Every vendor or user of gasoline shall keep the same in stenciled inclosures, as aforesaid, and not keep kerosene in like manner; provided, that in case of gasoline and the like, or any product containing the like as a constituent part, of not more than a quart for cleaning purposes, the inclosure may be marked by the name of the product and with the words "unsafe when exposed to heat or fire" painted in bright red ink in letters not less than one fourth of an inch in size.

(14) Penalties shall be as follows:

(a) For selling or offering, personally or otherwise, or in any manner disposing of or attempting to dispose of, any untested and duly stamped and approved product of petroleum for illuminating, heating, or power purposes, or knowingly using or furnishing the same for such use, a fine of from $5 to $500, in addition to liability to the party injured for all damages by him sustained.

(b) For wilfully adulterating illuminating or heating oil, by adding thereto any substance, $50 to $500, or imprisonment in the county jail not more than six months.

(c) For falsely marking an inclosure, personally or otherwise, altering or defacing in any way any of the inspector's markings; or using, in any way, as before, any marked inclosure, without first canceling the inspector's markings, and having a new testing and marking; or offering for sale, or selling, any of the product "representing it to be in any respect other and different in quality or kind than as represented to the person purchasing the same;" or without displaying conspicuously at the place of sale a notice of the "tests both flash and burning, according to the last certificate issued by the deputy inspector making the inspection of the products, as to explosive qualities, and the gravity test of gasoline, provided for in this act," $5 to $500, or imprisonment in the county jail for not more than six months, or both fine and imprisonment.

(d) For disposing, in any way, of any package without first thoroughly canceling, defacing, or removing the inspector's marks, $5 to $500, or imprisonment in the county jail not exceeding six months.

(e) For knowingly offering for sale or using any coal kerosene oil or product for illuminating or heating purposes, which will emit a combustible vapor or burn freely at a temperature less than a specified degree, by a particularly specified standard, or burning in a lamp or vessel or using for illuminating purposes, in any of specified places, any petroleum product which will ignite and burn under a specified temperature by a specified standard, $100 to $1,000, and liability for resulting damages.

(f) For selling or offering for sale any condemned oil, $100 to $1,000, or imprisonment in the county jail not more than six months, or both fine and imprisonment.

(g) For neglect to keep any product, either by seller or user, or to deliver the same as required, $5 to $50, or impris-

onment not to exceed three months, or both fine and imprisonment.

For the appellant there was a brief by *Marshutz & Burnham,* and oral argument by *J. H. Marshutz.*

For the respondent there was a brief by the *Attorney General, A. C. Titus,* assistant, and *J. L. O'Connor,* of counsel, and oral argument by *Mr. O'Connor* and *Mr. Titus.*

MARSHALL, J. The foregoing summary of the act, challenged in this case, shows that it is of no ordinary importance. It interferes, in general and particular, with personal liberty in respect to handling and using many products which have come to be regarded as common necessaries. It does so with a particularity not found in any other legislation of the sort, so far as can be discovered. "Pity 'tis," in the judgment of the writer, if it be true that the common products of mineral oil, which have come to be, in such a multitude of ways, objects of human desire; obtainable for consumption at so low a price as to be within the reach of the humblest, are so highly dangerous; and the individual has so little capacity for protecting himself from fraud and danger, and so little inclination to properly use what knowledge he has in that regard; and is so prone to be ignorant through negligence,—that there is reasonable necessity of putting him under so many and such particular restraints as to injuring himself and of so minutely guarding him against fraud, and of so menacing him with so many threats of punishment. That such assertions of police authority should make extraordinary modes of nullification, like the one invoked here, much more often resorted to than formerly, is a natural result of the new conditions.

Doubtless when an enactment is wholly, or in greater part, unconstitutional, or in such part void that it is clear, the person invoking equitable interference against persons assuming to have authority, as public officers, to enforce it, has no other way of adequately remedying the wrong, the doors of that

ultimate resort should swing open freely. But it will not do to make of the courts, by equitable interference, a sort of superior upper house to consider and pass, in general, and particular as well, upon legislative enactments, as the court is requested to do in this case.

If an enactment, in its general scope and dominant particulars, is legitimate, as a general rule, equity jurisdiction for an attack upon the law should not be invokable to test mere minor features, but they should be left to their fate as cases arise specially involving them.

Courts of equity have a very large jurisdiction in the sense of power itself. They have an important secondary jurisdiction to determine when they ought and when they ought not to use that power. Power is given in very broad field, coupled with a very broad discretion as to when and when not to use it. In the exercise of the secondary power, the court should, as a rule, decline to exercise jurisdiction, though having it, to enjoin public officers from executing the legislative will as to some one or more minor features of a law, not essential to efficiency of its dominant legitimate features. That measure of reluctance to deal in the field of constitutional nullification, is due to the lawmaking power. Its indulgence will in no wise militate against a vigorous performance of duty in a situation where there is no judicial right to decline to exercise jurisdiction. It has been said that, in such situations, to so decline "would be treason to the constitution." True, but it would be a practice not much, if any, less dangerous, whether it be called treason to the constitution or by a milder name, to exhibit that willingness to defeat the legislative will, involved in judicial nullification of its enactments in advance of there being reasonable necessity for consideration of the matter, as well as unavoidableness, in reason, as to the result.

The manifest purposes of the enactment here are to conserve individual members of society and their property from physical harm and prevent them from dealing fraudulently,

or being victimized by fraudulent practices. Those purposes concern the public welfare in a very broad sense. Hence, the enactment is within the scope of the police power. No question is raised as regards public safety being within such scope, but it is suggested that prevention of and protection from fraudulent practices is not. Counsel is wrong on that point, as ruled by *Meyer v. State,* 134 Wis. 156, 114 N. W. 501, and cases in the federal and state courts, too numerous to mention, sustaining police regulation with reference to butter, oleomargarine, lard, flour, phosphate, grain, tobacco, milk, and many of the common things used in our domestic life, in numerous instances not involving any element detrimental to health; all such regulations being for the purpose, ostensibly at least, in whole or in part, of preventing dealers from expressly or impliedly misrepresenting things offered for sale, and protecting purchasers from being imposed upon as regards the nature of the thing purchased for use, the exact nature of which is not discoverable by ordinary inspection.

That the dangers in general, sought to be guarded against by such laws as the one in question, justify exercise of sovereign police authority, needs no discussion. Laws on the subject exist in nearly, if not, every state in the Union and have uniformly been sustained or treated as constitutional as a matter of course. True, none of them, so far as we can discover, go so far, as regards interference with the liberty of consumers, as the one in question. But there is not much, and, seemingly, no, material difference as regards the general scheme of inspection of products of petroleum before being offered for sale, and official approval of suitableness for use and evidence thereof, between the act in question, those found in other states, and the law here since the enaction of ch. 114, Laws of 1897. The following are but a few of the decisions elsewhere sustaining or recognizing validity of laws containing all the general features we have here, so far as designed to prevent the sale of petroleum products, unsuitable for use:

Willis v. Standard Oil Co. 50 Minn. 290, 52 N. W. 652; *Ex parte Robinson,* 28 Tex. App. 511, 13 S. W. 786; *County Court ex rel. Jenks v. Fassett,* 65 Mo. 418; *Hawkins v. L. & N. R. Co.* 145 Ala. 385, 40 South. 293; *Burkhardt's Adm'r v. Striger,* 113 Ky. 111, 67 S. W. 270; *Blaco v. State,* 58 Neb. 557, 78 N. W. 1056; *Hatcher v. Dunn,* 102 Iowa, 411, 71 N. W. 343; *Comm. ex rel. v. Bradley,* 210 Pa. St. 66, 59 Atl. 433; *Louisiana State Board of Health v. Standard Oil Co.* 107 La. 713, 31 South. 1015.

It seems quite obvious that the subject of the act is within the field of police power and the general features satisfy the constitutional requirement of reasonableness. The importance of securing consumers immunity from being imposed upon respecting the quality of petroleum products purchased for use, is obvious, and the impracticability, in general, of their determining for themselves such quality, is likewise obvious. There are common dangers and common beneficial purposes. So all elements are apparent warranting legislative regulation.

It is said the law is a taxing measure and so is contrary to the constitutional provision designed to secure uniformity in that field. That cannot prevail unless the fees are so clearly exorbitant, viewed as mere regulation expenses, that it could not reasonably be claimed the purpose was merely to lay the burden of executing the law upon the property involved. *Wis. Tel. Co. v. Milwaukee,* 126 Wis. 1, 104 N. W. 1009. True, it is alleged in the complaint that the fees are exorbitant; but the question on that subject is not one of fact to be determined by evidence and taken as admitted by the demurrer, as claimed by appellant, merely because a surplus is in fact, or probably will be, collected. If the law, speaking for itself, in the light of common knowledge and adjudications, shows clearly that the fees may reasonably be regarded as mere police expenses, then the allegation to the contrary cannot change the aspect of the matter and make it one to be settled on evidence. It is considered that they can be so re-

garded. They are about the same as in laws generally on the subject throughout the country, and in no case have similar charges been held exorbitant, so far as we can discover.

The point is made that the act is an interference with interstate commerce. That is ruled against appellant by the decision that the act is a valid police measure. *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 117 N. W. 686.

The further point is made that the act violates the constitutional provision making the secretary of state the state auditor, in that sec. 1421*d*, Stats. (Laws of 1909, ch. 363), provides that the salary and expenses of and disbursements by the supervising inspector shall be paid by the state treasurer out of the special fund derived from execution of the law, on vouchers approved by the governor, and that the expenses of deputy inspectors shall be paid out of the special fund upon being approved by the supervisor and governor.

The act, as to disbursement of money, is very unskilfully drawn. Taking it literally, it contemplates payment of the supervisor's fees without any auditing, strictly so called. It makes no provision, whatever, for the manner of payment of salaries of deputies, while it contemplates an approval by the governor of such deputies' expenses and an audit by the secretary of state before payment. It is easily seen that the term "approved" was not used as including the constitutional audit. It is the judgment of the court, that out of the confusion found in the section, no unmistakable command or authorization can be found to pay money out of the state treasury in absence of the constitutional audit. Therefore, it must be read in harmony with the fundamental requirement that, notwithstanding executive approval, or that of the supervisor, there must be an auditing by the secretary of state before the state treasurer can rightly pay out money intrusted to his custody. The approval of expenses and salary bills required must be regarded as mere evidence of legitimacy to be considered by the secretary of state in performing his duty.

The foregoing covers all contentions of counsel for appel-

lant which, in any event, could be considered as going to the validity of the whole act. As before indicated, whether in any mere matter of detail, the act be fatally uncertain or unconstitutional, the court should not permit equity jurisdiction to be used in a suit of this sort to determine, and no such matter should be regarded as having been determined in this case either originally or on this appeal.

By the Court.—The order is affirmed.

BOUCHER, Administratrix, Respondent, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Appellant.

November 12—December 7, 1909.

Railroads: Injury to brakeman uncoupling cars: Negligence of engineer: Questions for jury: Comparative negligence: Special verdict: Instructions to jury: Excessive damages.

1. Upon evidence tending to show, among other things, that, to enable a brakeman to uncouple a chain coupling between a switch engine and a car, he gave, and the engineer received, the signal to "slack the pin;" that this called upon the engineer to move his engine a few inches only; that the engineer understood the situation and knew that a movement of a few inches would suffice, but that he moved his engine several feet, bringing together the drawbars of the engine and car, which had been about two feet apart, and crushing between them the brakeman, who after drawing the coupling pin had moved forward between the drawbars,—it is *held* that the engineer had reason to anticipate that an injury might result from his management of the engine as stated, and that the question of his negligence in such management was for the jury.
2. Although in such case the brakeman was, as a matter of law, guilty of contributory negligence, yet it not appearing that he deliberately placed himself in a position imminently dangerous to his life, or that he did not get between the drawbars through slight inadvertence, the questions whether the engineer's negligence was the proximate cause of the death and whether the decedent's negligence was slighter or greater than that of the engineer were properly for the jury.

3. In a question in a special verdict asking whether the negligence of an engineer was "*less* or greater as a contributing cause" of the death of a brakeman than the negligence of the brakeman himself, the word "less" conveyed the same idea as the word "slighter" used in sec. 1816, Stats. (Laws of 1907, ch. 254).
4. Instructions expressly informing the jury that in assessing damages for the death of a married man they could not go beyond compensation for the pecuniary injury to the wife, are *held* to have corrected any misconception which might have arisen from a remark, made by the court in reply to a statement by counsel, that "the question is, How much pecuniary loss has the relative suffered—that is, in this case, the wife and children of the deceased suffered—by reason of the death?"
5. An award of $7,500, confirmed by the trial court, for the death of a brakeman, is *held* not excessive.

BARNES and MARSHALL, JJ., dissent.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

At North Fond du Lac the defendant has an arrangement for handling cinders. The arrangement is the only one of its kind operated by the defendant. Under one of the defendant's tracks is what is known as the "cinder pit." On the bottom of the cinder pit, which lies nine or ten feet below the track, are two sets of parallel tracks running east and west. At the north and south of the tracks in the pit are abutments. The east end of the pit is closed. The pit is reached by a curved and inclined track about 300 feet long. There is room in the cinder pit for two gondola cars. When the two cars are in the pit they come very close together and are very close to the abutments. In using the pit the cars are at first run partly in, being blocked so that the half farthest in is under the track above. Locomotives on the track above are stopped over the cars in the pit, and the ashes and cinders which are dumped therefrom fall between the rails into the cars below. When the cars are half filled the block is removed from the wheels and the cars are allowed to slide down the incline so as to permit the filling of the other half. Owing to the curve and the incline of the track leading into the pit a chain coup-

ling is used between the cars and the engine when cars are placed in the pit.

The plaintiff's intestate had been employed by the defendant for about nine months as a brakeman. On August 4, 1908, the deceased was assigned to assist, under the switch foreman, at the task of removing the filled cars and of placing empty ones in the pit. The two loaded cars were removed by the foreman of the regular switch crew with the aid of an engine crew, who had not performed this work before, and an empty car had been placed on the north track. The deceased had meanwhile tended a switch. When the second car was being placed the deceased assisted and did the uncoupling of the engine from the car. The engine had run the empty car too far into the pit and it was necessary to back out. When the car was in proper position it was blocked there by Loucks, the foreman of the regular switch crew, who then stepped back to the north of the car, so that he was about ten feet from the deceased. The engine was still attached to the empty car by the chain coupling, and it was necessary for the engine to move a little toward the car so that the pin holding the chain could be pulled out and the engine uncoupled from the car. The space between the drawbars of the car and the engine was about two feet. The deceased stepped from the north between the engine and the car to draw the pin, and was then on that side of the drawbars. He gave by word and sign the signal for "slack the pin." The foreman communicated the signal to the fireman, by whom it was, in turn, communicated to the engineer. Thereupon the engineer released the brake on the engine and it slowly started toward the car. Loucks, the foreman of the switch crew, was the only person who was observing the deceased. He testified that the deceased, whose back was toward him, pulled the pin; that the chain dropped from the car; that just after the deceased pulled the pin he moved forward between the drawbars of the car and the engine; and that as he stepped forward he turned his face toward

the engine and was immediately caught between the drawbars. The engine moved forward, and the deceased was caught and injured and crushed between the drawbars of the car and of the engine. He died almost instantly. Besides the injury to the part of the body caught between the drawbars, the thumb of the right hand of the deceased was injured. The jury found that the negligence of the engineer in slacking the pin was the proximate cause of the death of the deceased, and that it was greater as a contributing cause to his death than the negligence of Boucher himself. They also assessed the damages. This is an appeal from the judgment on the verdict.

For the appellant there was a brief by *W. D. Corrigan* and *W. A. Hayes,* and oral argument by *Mr. Hayes.*

For the respondent there was a brief by *Ecke & Hughes,* attorneys, and *J. E. O'Brien,* of counsel, and oral argument by *Mr. O. H. Ecke* and *Mr. O'Brien.*

The following opinion was filed December 7, 1909:

SIEBECKER, J. The appellant assails the court's decision holding that the evidence in the case required submission of the issues whether the engineer was negligent in conducting the defendant's business at the time Boucher was injured; if so negligent, whether it was the proximate cause of the injury, and whether such negligence was a greater or less contributing cause in producing Boucher's death than his contributory negligence. The facts of the case controlling these questions are within a narrow compass, and are so interrelated that a reference to them will suffice for the consideration of all the questions presented by these contentions. The foregoing statement of them makes clear what were the duties assigned Boucher and the engineer in conducting the defendant's business at the time of the accident. It is argued that the facts wholly fail to show that the engineer was negligent in managing the engine for the purpose of slacking the coupling chain

when signaled so to do by Boucher, and that the accident was wholly due to the fact that the decedent deliberately and negligently stepped into a place of obvious and imminent danger.

It is undisputed that the car had been shoved into the cinder pit; that it had been blocked; that the engine had come to a stop; that the chain forming the coupling between the car and the engine was taut so that the coupling pin could not be released without slacking; that the decedent was required in the performance of his duty to step between the car and the engine to do the uncoupling; that it devolved on him to give the signal for slacking the coupling chain to enable him to pull the coupling pin; and that it was the duty of the engineer to move the engine for this purpose when the signal therefor was communicated to him. There is no dispute but that the signal to this effect was communicated to the engineer for this purpose. The switch foreman testifies that the decedent gave the signal for the "slack of the pin" and that he communicated it to the fireman. The fireman testifies that he communicated it to the engineer and that he thereupon moved the engine forward. The engineer testifies that he received the signal "to slack ahead," which implied that he was to proceed until signaled to stop. He states that his recollection of the signal is uncertain. He also testifies that he was fully informed that the car had been blocked; that the engine was required to move forward only a few inches to slack the chain in order to loosen the coupling pin; that a movement of a few inches would suffice and was the only movement toward the car required of the engine; that the last act before moving the engine away from the car was the uncoupling; and that he fully understood all the facts and conditions of the service in which they were then engaged. The court submitted to the jury the question of whether the engineer under the circumstances was negligent in the management of the engine which resulted in a forward movement of several feet and in contact with the car.

The point is made that the engineer had a right to move the engine as he did in response to the signal given him. There is dispute, however, as to what signal he received. The jury evidently found that he received the signal to slack the pin, and that this called on him to move the engine only a few inches. There is evidence of other employees of the defendant in support of this view. Furthermore, the engineer was fully informed of the whole situation and the conditions under which he was acting and knew that he was required to move the engine no more than was necessary to slack the pin. In fact he moved the engine several feet, and thereby brought about the contact between the engine and the car whereby Boucher was injured. It is evident that the movement of three or four inches of the engine could have been made readily.

However, it is claimed that the engineer had no reason to anticipate that an injury would result from the movement made by the engine. The situation apprised him that Boucher was then between the car and the engine for the purpose of pulling the coupling pin, and that such a movement as was made must result in a collision with the blocked car in the cinder pit. Surely such a movement of the engine was fraught with danger to the decedent, who was in a proper position to perform his service, and the engineer had a reasonable basis for anticipating that an injury might result from such management of the engine. We are led to the conclusion that the facts and circumstances of the case required that the question of the engineer's negligence in the management of the engine should be submitted to the jury as was done in the first question of the special verdict. The court informed the jury that this question included the inquiry as to whether the engineer was negligent in moving the engine forward to remove the strain from the coupling chain and thus to free the coupling pin so that it could be pulled. The instructions in this respect fully informed the jury of the scope of this issue

and of what it embraced. The court in calling the jurors' attention to the evidence on this subject did not restrict the jury to the portion he alluded to, but instructed them to take into consideration all the evidence bearing on the inquiry so submitted to them. The instructions so given were free from undue restrictions on the jury in their deliberations and in no way misled them.

It is contended that the court erred in refusing to instruct the jury to the effect that if the engineer was found guilty of negligence it was not the proximate cause of Boucher's death, and that his death was proximately caused by his contributory negligence. The court found as matter of law that the decedent was guilty of contributory negligence. The argument is made that the engineer had a right to rely on the fact that Boucher under no circumstances would occupy a place wherein he might be caught between the drawbars of the car and the moving engine and thus meet certain death, unless he deliberately placed himself in this obviously and imminently dangerous position. Is this a legitimate deduction from the facts and circumstances of the case? We do not so regard it. Boucher's conduct must be considered in the light of the situation as disclosed by the facts and circumstances under which he performed his duties. It is clear that he took a position between the car and the engine where he could readily grasp and pull the coupling pin from the coupling device of the car, and that he pulled the pin and thereby caused the chain to drop. The jury from the evidence must have found that in giving the signal to "slack the pin" he called for a forward movement of the engine of but a few inches. In his position between the car and the engine his back was turned toward the engine, and there was sufficient space for him to pass between the drawbars of the car and the engine. Having given the signal to the engineer to come forward with the engine sufficiently to slack the pin, he, in the exercise of reasonable care, might well anticipate that the engine would move no farther

than required for this purpose. While he cannot be deemed free from blame in not looking to see if the engine was approaching, it does not appear but that he may have taken the step to complete his duties, and that in the ordinary course of discharging his duties he got into this space through very slight inadvertence, or that the physical condition of the track may have caused him to take this step. All this refutes the assumption that he deliberately placed himself in a place imminently dangerous to his life. From the situation thus presented it cannot be said that the duty to protect himself against the hazards incident to the engineer's conduct rested solely on Boucher and that the engineer was free from legal responsibility as to the result. From the very nature of the situation and corresponding duties of the two men to guard Boucher against injury it may be said that the negligence of the engineer was of a graver and weightier character as a contributing cause to Boucher's death than that of the decedent. After careful examination of the evidence and much reflection we have become persuaded that the facts of the case are not so clear upon the issue of the engineer's negligence and its proximate contribution toward causing Boucher's death, and upon the question of whether the decedent's contributory negligence was slighter or greater than that attributable to the defendant, as to require determination of them by the court as matter of law. The court properly submitted them to the jury.

It is strenuously argued that the jury cannot determine from the evidence whether Boucher's death was caused in greater part by the negligence of the defendant as compared with his contributory negligence, and hence that the plaintiff has failed to establish her cause of action. In support of this claim the contention is made that the burden is on the plaintiff to establish a cause of action, and that the evidence fails to show any grounds justifying Boucher's stepping between the drawbars, and he must therefore be held to have taken this step knowing it meant certain death. The facts and circum-

stances of this situation already adverted to we think negative this claim, and show that the jury could have found that he entered this space through slight inadvertence, and that the conduct of the engineer in comparison therewith may be considered a weightier and graver default. The provisions of the statute regulating these questions and the province of the court and the jury under them were considered and interpreted in the cases of *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, and *Zeratsky v. C., M. & St. P. R. Co., post,* p. 423, 123 N. W. 904, and therefore need not be repeated here.

An exception is urged to the testimony of Dr. Pullen for the reason that it was immaterial and from its nature operated to prejudice the jury in a controversy of this kind. We discover nothing prejudicial in the evidence. So far as received it was relevant to the inquiry as to how Boucher came to his death.

It is urged that the court erred in denying defendant's motion to strike out the evidence of the engineer's negligence in moving the engine as not within the allegations of the complaint. The allegations of the complaint charged the engineer with carelessly and negligently operating the engine by causing it to move forward at a dangerous speed and for a distance imperiling the decedent's safety and thereby causing the injury. The evidence offered was relevant and material to these allegations. The objection that the questions of the special verdict did not properly cover the litigated issues and that they were so framed as to mislead the jury is not sustained. As heretofore indicated, the phrase in the first question, "slacking the pin," was properly explained and defined by the court's instruction as covering the inquiry respecting the negligent movement of the engine under the engineer's management. The objections to the second and fourth questions are based on the idea that Boucher's negligence was the sole proxi-

mate cause of his injuries, and that the court should have so ruled as matter of law. The foregoing consideration of the facts disposes of these objections.

The requested questions for the special verdict relate to the same subject and were properly refused.

The validity of ch. 254, Laws of 1907, is merely suggested. The decision in *Kiley v. C., M. & St. P. R. Co., supra,* is determinative of this question.

Numerous detailed portions of the instructions given to the jury are called to our attention as erroneous and prejudicial. Many of them pertain to the questions considered above, and were not subject to the criticism made in view of the foregoing considerations and our conclusions as to those questions.

The fourth question is assailed as incorrectly framed under the statute, in that the words "less or greater" were used, instead of the words "slighter or greater," in determining decedent's negligence as a contributing cause in comparison with that attributable to the company. We discover no cause for complaint in this. The word "less" as here used conveyed the same idea to the jury as the word "slighter" as used in the statute.

Defendant urges that a new trial should have been awarded because an impartial trial was denied it, and avers that this was occasioned by the improper arguments and comments concerning the evidence and fictitious issues used by the plaintiff's counsel before the court and jury, by improper comments on the evidence and admonitions to witnesses by the court, through the order of the court that the witnesses be kept in a room separated from the courtroom, by permitting the jury to view the premises, and by plaintiff's manner of conducting the case. It is claimed that the plaintiff's manner and method of eliciting proof and of bringing immaterial and irrelevant matters to the attention of the jury were calculated and did operate to prejudice the defendant. We have examined all of

these points and find nothing in the record showing that any prejudice resulted in any respect. The record discloses that the parties had a full, fair, and impartial trial.

The damages awarded are alleged to be excessive. It is claimed that the court in reply to a comment by counsel to the jury confused and misled the jury by the following observation:

"The question is: How much pecuniary loss has the relative suffered—that is, in this case, the wife and children of the deceased suffered—by reason of the death?"

When the court submitted the question of damages to the jury they were instructed:

"You are not warranted in giving damages not founded upon testimony, nor can you go beyond compensation for the pecuniary injury to the wife."

The court in effect repeated the information that damages could only be allowed the wife to compensate her for the injury caused her by her husband's death and properly specified the elements entering into her loss. We are satisfied that the jury were thereby fully informed of the correct rule of damages, and that any misconception which might have existed as a result of the first statement made by the court was fully corrected. The damages were found at the sum of $7,500. The jury is given a broad discretion in assessing damages. The trial court confirmed the verdict. This is of weight in such cases. We are of opinion that the facts and circumstances of the case authorized the jury to assess the amount awarded. *Ryan v. Oshkosh G. L. Co.* 138 Wis. 466, 120 N. W. 264.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

The following opinion was filed December 7, 1909:

BARNES, J. (*dissenting*). The facts in this case are few and simple. The trial court held as a matter of law that the dece-

dent was guilty of contributory negligence, because, without any apparent reason or excuse for his so doing, he attempted to pass between the car and the engine while the latter was in motion and was caught between the bumpers. This court concludes that the trial court was right in so holding. The space between the bumpers was but two and one-half or three feet before the engine started its movement toward the car. The decedent knew that the engine slacked ahead, else he could not have pulled the coupling pin. He gave the signal for such slacking in order that he might pull the pin. Presumably he knew the engine was in motion when he attempted to pass through; at least, in the exercise of ordinary care he should have known it. As a matter of fact his face was turned toward the engine when he was caught. It is useless to speculate on how he happened to place himself in the peril which resulted so disastrously, as there is no evidence to show any reason or any excuse for his so doing. The jury found that the engineer was negligent in not slacking his engine two or three inches instead of two or three feet. The engineer could hardly be said to have anticipated that injury would result from bringing the bumper on the engine in contact with that on the car, because couplings and uncouplings are usually made by bringing the bumpers in contact with each other. It is a rather far-fetched assumption to say that the engineer in this case should have apprehended that the deceased would attempt to pass through while the engine was in motion, or that any accident would result from permitting the bumpers to come in contact with each other. But, assuming that there was evidence from which the jury might have found that the engineer was negligent, I do not think recovery should be permitted.

Our comparative negligence statute is new. We must assume that the legislature meant what it said. Where the plaintiff is guilty of contributory negligence he cannot recover unless (1) the negligence of the defendant is greater than his,

and (2) unless the negligence of the defendant contributes in a greater degree to produce the injury complained of than does that of the plaintiff. These two essential facts must be established by the evidence as any other fact in the case. If there is evidence to sustain the findings of the jury they should stand. If there is not they should fall. I fail to see where there are any facts or circumstances proven in this case that warrant a finding to the effect that the negligence of the defendant was greater in degree than the contributory negligence of the decedent, or that the negligence of the defendant could by any possibility contribute in a greater degree to produce the injury than the contributory negligence of the decedent. I think, therefore, that these findings of the jury should have been set aside for want of evidence to sustain them, and judgment awarded for defendant. It seems to me that the apparent purpose of this law has been defeated to a large extent by the requirement therein of a finding that the negligence of the defendant must contribute in a greater degree to produce the injury than the contributory negligence of the plaintiff. There can be no contributory negligence except where the accident would not have happened but for the negligent act of the servant. Neither is the master negligent unless his act or omission was the proximate cause of the injury. How in the ordinary case it can be said that the negligence of the one is a greater producing cause of the injury than that of the other it is difficult to see. The statute is plain, however, and if it is faulty it should be corrected by the lawmaking power rather than by inadmissible judicial construction.

The following opinion was filed December 21, 1909:

MARSHALL, J. (*dissenting*). I agree with all said in the dissenting opinion by my Brother BARNES, and choose to add a few observations of my own.

This case presents one of a class of those distressing situations which must be met with courage in administering our

modified ancient system of negligence law. The fact that the system, in many cases, makes no provision for unfortunates who are daily sacrificed upon the altar of industry, nor for their dependent families whose destroyed welfare is a like sacrifice, is a most lamentable defect in our remedial Code. That the subject is, *as it is,* is one of the most significant illustrations of "man's inhumanity to man." It is, I may well say, a most distressing commentary upon the wisdom of the lawmaking power. 'Tis "strange," 'tis "passing strange" that such commentary should, as it does, apply more strongly to our country than to any other civilized nation on earth, notwithstanding it has been blessed for more than a century with exceptional liberty of action as regards constructive legislation for the public welfare.

If it were given to courts, by their humanity to man, to supply the want of written law, instead of their sphere of action being confined, as it is, to the mere administration of law as they find it, not turning aside, through pity or charity, to punish upon one side, or afford relief upon the other by taking the burden of misfortune from the backs of the weak and humble and casting it upon those of the strong and capable, nor to make distribution of misfortunes according to mere dictates of humanity, nor to look with any greater degree of favor upon one than upon the other, because of situations, or needs, after the manner of equitable arbitration, we could approach such a pitiful result as the one in hand in a different attitude. No suggestion is involved in this, that any one, in reaching the conclusion from which I dissent, was actuated by any less fidelity to the great trust with which we are charged, than the writer. Different mentalities with equal degrees of sympathy for human suffering, and stern fidelity to administer a trust from the standpoint of absolute right as incorporated into the law, see things in different aspects. Hence the greater certainty of many minds reaching the proper standard, than one.

When the time shall come that the moral sense and con-

science of lawmaking power shall be so stimulated as to devise a practicable system, whereby all sacrifices, like the one in hand, attributable to mere human inadvertences which, in the very nature of things, must always be unavoidable incidents of industrial life, and be as progressive in number and disturbing consequences as are human activities,—will be distributed and added to the cost of things entering into consumption, with a minimum of distress and waste, the vista of the future for all will have much more of sunshine. Sometime the now unnecessary waste and suffering from the inadvertent incidents of human industry will be obliterated and there will be a simple method of so distributing their immediate effects over the general mass of things entering into consumption, as to minimize the individual losses and soften the condition in each case of the one offering up the sacrifice without appreciably changing the general level of mankind served directly or indirectly by the toilers. We cannot doubt the wisdom of lawmaking power, suitably aroused, to attain this end.

With the thought that the foregoing observations are not out of place in a legal opinion and may bear fruit, some other day, I will proceed to a brief discussion of this case.

According to the verdict and the undisputed evidence, the deceased was guilty of a want of ordinary care in stepping between the bumper of the standing car and that of the engine as the two were closing together, proximately contributing to his death. That serious injury or death from any attempt to pass between the bumpers was highly probable, seems unquestionable. It must be remembered that as the deceased made the fatal step he faced the engine. He could not have helped seeing it and that it was in motion. The engineer could not have well seen him. That the engineer should reasonably have apprehended the deceased might do such a reckless act, cannot, it seems, be thought for a moment. That he should reasonably have apprehended the deceased would be injured, if not clear from the cars, in case the bumpers

came together, as they often do, as a matter of common knowledge, in case he merely failed to step out from between the cars before that event, it seems is quite as remote.

At this point we have reached, I think, a fatal infirmity in the court's reasoning. Such reasoning is to the effect that there was imminent danger, in any event, of the deceased getting injured if the engineer backed his engine more than a few inches, and particularly if he backed so as to close the bumpers together. I do not so understand the evidence. On the contrary, I understand that if the deceased had remained outside the path of the bumpers, though between the end of the car and that of the locomotive, and paid the attention to his surroundings which the engineer had reason to expect he would, there would not have been any likelihood of his being injured. So it seems the case, necessarily, comes down to whether the engineer had any reason to expect the deceased would attempt to pass between the bumpers, before there is any room for a comparison of direct effects of faults as regards the two actors in the tragedy.

A second fatal infirmity, in my judgment, in the court's reasoning, is the logic indulged in, minimizing the gravity of deceased's fault in placing his person between the bumpers. "It does not appear," says the court, "but that he may have taken the step to accomplish his duties, and that, in the ordinary course of discharging his duties, he got into the space through oversight, inadvertently, or that the physical condition of the track may have caused him to take this step." As I understand that, it proceeds directly contrary to the verity in the case that the deceased was guilty of a want of ordinary care proximately contributing to his death. I must view the finding on that subject in the light of the construction which the court has placed on the legislative question; *i. e.* that the words "any negligence" in the question mean any want of ordinary care. Moreover, according to all the precedents in the books, and common sense as well, it is want of ordinary

care, as a matter of law, for a person, in coupling and uncoupling cars, to step between the bumpers where the situation is the same or similar to the one in this case. "He might," says the court, only have been guilty of "very slight inadvertence." Does that not overlook the fact that "very slight inadvertence" is not a want of ordinary care? If he were only guilty of "very slight inadvertence" the verdict is wrong. So the court's logic is beside the case, and clearly so in my judgment. "Very slight inadvertence," or in other words negligence, as this court has uniformly held, is not within the field of responsible causation or defense to it. The decisions to that effect are so numerous that the rule needs but to be stated. *Dreher v. Fitchburg,* 22 Wis. 675; *Ward v. M. & St. P. R. Co.* 29 Wis. 144; *Lockwood v. Belle City St. R. Co.* 92 Wis. 97, 65 N. W. 866.

As said in effect in the latter case, this court has adhered, notwithstanding some confusion caused by an opinion now and then, to the classification of negligence as slight, ordinary, and gross. The first is not actionable. The second is, and the first is not a defense thereto. The third is, and neither the first nor second is a defense thereto. *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446.

True, it will be found stated in an opinion now and then, that any negligence, however slight on the part of an injured person, contributing to his injury, is a defense to his action against another whose want of ordinary care was a proximate cause thereof, but it has been explained and corrected over and over again (*Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 341, 84 N. W. 446), and held that it requires more than mere slight negligence to so operate. The law in that regard is too well understood at this late day to admit of serious question. As said in my opinion in *Zeratsky v. C., M. & St. P. R. Co., post,* p. 423, 123 N. W. 904, that rule was one of the very things the legislature, by the act of 1907, intended to change. But the court thinks otherwise, holding that something more than mere negligence is required for attack or defense in a

case of this sort. We must test the verdict in this case and the logic of the court's opinion accordingly, treating the verdict as necessarily meaning that the deceased was guilty of more than slight negligence, or in other words "slight inadvertence."

How can one say that the deceased "may have taken the step" that placed him between the bumpers "in the ordinary course of discharging his duties?" No such movement was required in performing such work. No evidence in the case suggests there was. All the evidence and common knowledge, it seems negative it.

Again, how can one say, as above quoted, without losing sight of the verity that the deceased was guilty of a want of ordinary care, proximately contributing to his death, in placing himself within the zone of imminent danger? Does not the thought that he may have stepped between the bumpers "in the ordinary course of discharging his duties" run directly counter to such verity?

Again, where is the evidence that the deceased stepped between the cars "in the ordinary course of discharging his duties," or evidence "that the physical condition of the track may have caused him to take this step?" The court does not point to any. Counsel for respondent does not claim there is any. There is none in fact. So, is not the logic upon which the result here stands, which is a repetition of the logic upon which the learned trial court grounded the decision, the merest conjecture; a substitution of mere possibility for probability and supposition for facts and evidence of facts, contrary to many decisions of this court? *Gibbons v. Wis. Valley R. Co.* 58 Wis. 335, 17 N. W. 132; *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 225, 80 N. W. 1020; *Gagan v. Janesville,* 106 Wis. 662. 82 N. W. 558; *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36; *Clark v. Franklin F. M. F. Ins. Co.* 111 Wis. 65, 86 N. W. 549; *Hart v. Neillsville, ante,* pp. 3, 14, 123 N. W. 125, 129.

The above and a large number of cases repudiate the

method of reasoning by which a conclusion is reached on mere supposition that something might have occurred of which there is no evidence. Very striking instances are those where a person was struck and killed by a railway train in the night-time, at a railroad crossing, leaving no one to explain how the accident occurred. The idea urged upon the court in such cases that the person killed might have gotten into the pathway of the train under some circumstances that would relieve him from fatal contributory negligence was rejected. *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505, 67 N. W. 1120; *Clemons v. C., St. P., M. & O. R. Co.* 137 Wis. 387, 119 N. W. 102. In these and numerous instances that might be referred to, the court was urged to hold that fatal contributory negligence was not shown as a matter of law, or so as to warrant a jury in finding it as a fact, because the burden of proof was on the defendant to prove such fact, and any one of several suggested circumstances, of which there was no evidence, was sufficient to relieve the injured one from any fatal fault, and such circumstances should have been negatived by evidence, or the presumption of due care held to prevail. But the court rejected that logic as not legitimate, upon the ground that evidence *prima facie* showing want of due care cannot be outweighed by conjecture.

The last foregoing leads to this fatal infirmity in the court's logic: If mere supposition could be legitimately indulged in at all to efficiently minimize the *prima facie* case of contributory negligence established by direct and circumstantial evidence, when the burden of proof is on the defendant to establish the fact in that regard, overcoming the presumption of freedom from such fault, it cannot on the question of superior direct effect in producing the injury. It must be conceded, I think, the burden of proof on that matter is on the plaintiff. It seems the court must have overlooked that fact in reasoning from conjectural situations and happenings, as if the question were whether there was any contributory fault on the part of

deceased. That matter, covered by the verdict in favor of the defendant, was confused, it seems, with the new subject, engrafted onto our system by the legislature, in respect to comparative direct effects in producing the results.

I will not pursue the subject of comparative effects further. Looking only at the evidence, freed from all mere suppositions of what might have occurred, of which there is no evidence, we have these plain facts: The deceased, face to the engine which was moving toward the standing car, and observant thereof, or reckless because he was not, but more or less obscured from the engineer's view, with time to step out from between the cars, as he should have done, and as the engineer had every reason to suppose he would do, the instant he pulled the pin, and yet where, as a skilled brakeman, he was in no danger, even if he did not step out, he stepped into the place which, of all others, no reasonably prudent person would ordinarily have expected him to, and was transfixed by the bumpers and killed, as he, more than any other person, under the circumstances ought reasonably to have apprehended might be the case. I cannot escape so concluding and that the result here should be accordingly, and that the logic upon which a contrary result has been reached runs counter to the general trend of our decisions, modified as they are by the act of 1907.

It seems that I should not close this opinion without acquitting the trial court of having reached the conclusion which has been affirmed, except under the mistaken notion, as appears, that he was really powerless to disturb the finding of the jury. He evidently took the law of 1907 as requiring, under all circumstances, submission to the jury of the question of comparative direct effects of the faults of the adversaries and that the finding, however absurd it might appear to him, was binding. He took the act of 1907 as it reads, frankly saying that, in his judgment, the verdict was wrong, but that the legislative command was, in all cases, to take the opinion of

the jury and that he did not think it was given to him to reject such opinion. That is my understanding of the learned judge's excuse for not setting aside the finding which he was satisfied was wrong. It was in that view, it seems, that he indulged in speculations, after the manner I have pointed out in this court's opinion, as to how the jury might have reasoned from mere supposition to the result reached, for the purpose of relieving the verdict from any suspicion of being characterized by perversity.

The appellant moved for a rehearing, but afterwards withdrew the motion and on March 21, 1910, obtained a writ of error removing the cause to the supreme court of the United States.

CASES DETERMINED

AT THE

January Term, 1910.

SMITH, Appellant, vs. CARTER and others, Respondents.

October 8, 1909—January 11, 1910.

Action: Dismissal for want of prosecution: Discretion: Appeal.

1. **It is the duty of trial courts to discourage protraction of litigation and to refuse their aid to those who negligently or abusively fail to prosecute actions which they commence.**
2. **A judgment of the circuit court dismissing an action for want of prosecution will be reversed only in a clear case of abuse of discretion.**

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This action, commenced in August, 1882, was to redeem from certain mortgages held by one Guy Carter on a valuable farm which had been delivered over to him in 1872 to apply the rents and profits to the taxes and to the interest and principal of those mortgages; also to clear the title from those mortgages and from certain tax deeds and liens thereon fraudulently acquired by said Carter, who had died shortly before the commencement of the action. The case was (January, 1883) referred to one Phelps to hear, try, and determine, and he made his report in 1891. Pretty much all the circuit judges of the Twelfth judicial circuit for the last quarter of a century were disabled to act in the case by reason of having been of counsel. The circuit judge of the First circuit seems to have been invoked to hear the motions for modification and

confirmation of this referee's report, and the argument of those motions was finally had in 1894. On December 30, 1901, Judge FISH, having previously given a written opinion, signed findings and order modifying the report of the referee. Such findings and order convicted Guy Carter of fraud with reference to the acquirement of tax liens, of refusal to perform his duty in keeping accounts and not applying the income and in so obstructing the plaintiff in an opportunity to sell the land and in refusing to accept a conveyance at a given price in liquidation of his mortgages after having first promised to do so, that the court decided he was entitled to no interest after 1880, the date of such tendered conveyance, and ordered application of sums of money so that it was obvious that the mortgage was more than satisfied at the time of such decision. He also in said order directed a re-reference to William Ruger, Esq., to restate the account in accordance with the court's decision, and to take an account by defendants of all receipts and disbursements with reference to the farm subsequent to the prior reference, they having continued in possession and control. There appears to have been no attempt to bring official notice to Mr. Ruger of his appointment or to gain his acceptance, and, as a matter of fact, it was known that he had been consulted, if not retained, as counsel for certain interests in the litigation at the time of such order of reference or afterwards.

In June, 1902, the defendants moved to set aside said order made by the judge of the First circuit for the reason that it was wholly without jurisdiction, it having been signed by him at his chambers in Racine and physically transmitted to the clerk of the Rock county circuit court at a time when he was not presiding in that court, but another judge was. This motion was heard before the judge of the Thirteenth judicial circuit, who on December 2, 1902, signed and filed an order that the motion be denied. This seems to have been supplemented or modified by an order on December 15th to the same

effect, except that it awarded motion costs. This order was assailed because without jurisdiction, the judge having signed it at a time when he was in Dodge county and not presiding in Rock county. This order of December 15, 1902, never reached the files of the circuit court for Rock county until April 20, 1908, when it was found in the office of one of the plaintiff's attorneys, and so filed. A motion to vacate that order was overruled in December, 1903.

From that time until the 13th day of April, 1908, no steps were taken by either party in the case, except that it appears certain negotiations were in progress to fix *inter partes* the amounts which had been received by the defendant subsequent to the previous accounting, so that the further steps might be entirely arithmetical, which negotiation, however, came to naught. On the 13th of April, 1908, defendants moved to dismiss the action because of unreasonable delay on the part of the plaintiff; that more than two years have elapsed since the date of the referee's report; that more than five years have elapsed since the issue was joined in November, 1882, and the action had not been brought to trial for the reason that the plaintiff had ceased to be the real party in interest; that he failed to prosecute with due diligence; that the executors of Guy Carter had been discharged as such; that it was inequitable that defendant should be further harassed; and that the plaintiff is not acting with diligence or in good faith, and that there is no equity in plaintiff's complaint, and that he had been guilty of laches and had abandoned the action. That motion seems to have been heard upon certain affidavits and upon the record of the case and resulted in an order on May 5, 1908, by the present judge of the Twelfth circuit, that the action be dismissed with costs, because it appeared to the satisfaction of the court that plaintiff had been guilty of unreasonable neglect and inexcusable laches in the prosecution of this action. From judgment pursuant to this order plaintiff appeals.

For the appellant there was a brief by *William G. Wheeler* and *William Smith,* and oral argument by *Mr. Smith.*

For the respondents there were briefs by *Wilson Lane* and *Ruger & Ruger,* and oral argument by *Wilson Lane, William Ruger,* and *C. E. Pierce.*

The following opinion was filed October 26, 1909:

DODGE, J. In the record of this case, which has witnessed the demise of at least five circuit judges connected therewith and of the referee who tried it, the circuit court found evidence of such laches and neglect on the part of the plaintiff as in its judgment rendered it improper that the action should further cumber the dockets, obstruct other business, and harass the defendants. While there are apparent many acts on the part of the defendants tending to excuse some of the periods of delay, and while dilatory action on the part of the court itself may explain some, yet there are other periods of much length during which plaintiff has undoubtedly refrained from any active diligence to bring the litigation to a conclusion. All these considerations were before the trial court, with much evidence as to the conduct of the parties, some of it in conflict, some of it uncertain and ambiguous, from which different inferences might be drawn. Even if we, as an original proposition, might not have reached the same conclusion, we cannot for that reason alone set aside the decision of the trial court rendered in the field of its broad discretion over the conduct of cases. Protraction of litigation may be a serious abuse, and it is the duty of trial courts, independently of statute and under inherent powers, to discourage it as much as possible and to refuse their aid to those who negligently or abusively fail to prosecute the actions which they commence. *Williams v. Williams,* 117 Wis. 125, 94 N. W. 25; *Saveland v. Connors,* 121 Wis. 28, 98 N. W. 933. When the circuit court exercises its judgment and discretion to this end, it is only in a very clear case of abuse that this court should reverse

it. We cannot feel that such clear case of abuse of discretion is here presented. It seems, too, that sec. 2811, Stats. (1898), declares a legislative policy to the effect that five years of neglect to bring to trial an issue joined shall result in dismissal. Here issues were framed in 1901 by the order then made and have not yet been brought to trial.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied January 11, 1910.

SHARON, by guardian *ad litem,* Respondent, vs. WINNEBAGO FURNITURE MANUFACTURING COMPANY, Appellant.

November 13, 1909—January 11, 1910.

Master and servant: Unlawful employment of minor: Injury: Negligence per se: *Proximate cause: Damages: Instructions to jury.*

1. The employment of a boy under the age of sixteen years in operating a circular saw, in violation of sec. 1728*a*, Stats. (Laws of 1907, ch. 523), is negligence as a matter of law.
2. Where as a result of such employment the boy is injured, the negligence of the employer is the proximate cause of the injury as a matter of law, the statute itself establishing the fact that some injury should reasonably be anticipated as a natural and probable result of its violation.
3. A finding by the jury in such a case that a defect in the saw was the proximate cause of the injury, is immaterial.
4. In an action for injuries to a minor, a charge authorizing the jury to assess damages to compensate him for resulting diminution in his earning capacity was not prejudicially erroneous, in the absence of a request for more specific instructions, even though plaintiff was not entitled to his earnings during minority.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This action was brought by an infant under sixteen years

of age through his guardian to recover for personal injuries. The complaint alleges that the plaintiff was under sixteen years of age, but had a written permit from the county judge pursuant to sec. 1, ch. 349, Laws of 1903, and that on the 4th day of November, 1907, plaintiff was directed and permitted to operate a ripsaw contrary to the laws of the state; that the machine had negligently been allowed to become unsafe and out of order, in that the gauge was defectively fastened and loose so that it moved and swerved sideways, thereby not holding the lumber securely; that the machine was without any split guard or device to prevent the teeth of the saw from catching pieces of lumber while being sawed; and that defendant negligently failed to warn or instruct plaintiff of the dangers of operating the machine.

At the close of the plaintiff's evidence defendant moved for a nonsuit, and at the close of all the evidence moved for a directed verdict, which motions were denied. Defendant requested that the court submit as part of the special verdict the following question: "Was the injury to plaintiff one the cause of which the jury is unable to determine from the credible evidence?" which request was denied. The jury returned the following verdict:

"(1) Was the gauge of the saw table at which plaintiff was injured loose and insecure at the time of the injury to such an extent as to swerve sidewise and thereby fail to keep panels of the size at the time being sawed in proper position while being run through the machine? *A.* Yes.

"(2) If to the above question you answer 'Yes,' then did the defendant use ordinary care in permitting the gauge to be at the time in the condition found? *A.* No.

"(3) Did the plaintiff, by pushing downward and towards his right with the fingers of both hands on the panel he was pushing at the time he was injured and when said panel was ripped nearly through, cause the gauge to swerve so as to 'pinch' or bind said panel between the gauge and the saw to such an extent as to produce the injury complained of? *A.* Yes.

"(4) Did the defendant's foreman give to the plaintiff sufficient instructions as to how to run the panels through the saw at or before the time of the injury? *A.* No.

"(5) If to the above question you answer 'No.' then did the defendant's foreman use ordinary care in not instructing him more fully before setting him at said work? *A.* No.

"(6) Did the defendant's foreman use ordinary care in setting the plaintiff at work at the saw on which he was injured in view of his age? *A.* No.

"(7) If to questions No. 2, 5, or 6 you answer 'No,' then was the want of ordinary care thus found the proximate cause of the plaintiff's injury? *A.* Yes.

"(8) If to the above question you answer 'Yes,' then which was the proximate cause of the injury?

"(a) The looseness of the gauge. X

"(b) Or the failure to give sufficient instructions.

"(c) Or setting a boy of his age at work at the saw.

"(9) Was there any want of ordinary care on plaintiff's part that contributed to produce his injury? *A.* No.

"(10) What sum will compensate the plaintiff for the injury sustained? *A.* $750."

The defendant made the usual motions for judgment and to change the answers to the questions in the special verdict and for judgment notwithstanding the verdict and to set the verdict aside and for a new trial, which motions were denied, except that the court changed the answer to the third question of the special verdict from "Yes" to "No" and ordered judgment for the plaintiff upon the verdict as amended. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Husting & Husting,* attorneys, and *Lamoreux & Husting,* of counsel, and oral argument by *Paul O. Husting* and *B. J. Husting.*

KERWIN, J. Several errors are assigned which in the view we take of the case need not be treated. It is without dispute that the injured boy was under the age of sixteen years, was

employed by the defendant to work at the circular saw in question, was injured by the saw while at work, and was not guilty of contributory negligence. Subd. 2, sec. 1728*a*, Stats. (Laws of 1907, ch. 523), provides:

"No child under the age of sixteen years shall be employed in adjusting any belt or in oiling or assisting in oiling, wiping or cleaning any machinery when the same is in motion or in operating or assisting in operating any circular or band saw, wood-shaper, wood-jointer, sandpaper, or wood-polishing machine, . . . or in any other employment dangerous to life or limb."

Sec. 1728*h*, Id., provides a fine and imprisonment for violation of the act. The prohibition under this subdivision is absolute and does not suffer the work to be done under permit from the commissioner of labor or other officer as is provided in cases of other employment specified in subd. 1 of the same section. The question therefore arises whether upon the established facts the defendant was guilty of negligence as matter of law. We think the case of *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563, is decisive upon this point. In that case it was held that, where a statute imposes a duty upon a class of persons to guard the personal safety of others, a failure to perform such duty constitutes actionable negligence, and renders the person guilty thereof liable to a person intended to be protected who is injured by such negligence without contributory negligence on his part. See *Mueller v. Milwaukee St. R. Co.* 86 Wis. 340, 56 N. W. 914, and *Woolf v. Nauman Co.* 128 Iowa, 261, 103 N. W. 785. The employment of the plaintiff in violation of the statute being negligence *per se* and the injury being caused by reason of such employment, such negligence was the proximate cause of the injury. True, the jury found that the looseness of the gauge was the proximate cause of the injury, but that finding does not help the defendant's case but rather makes the case against it stronger. If the defendant was guilty of negligence as a matter of law in employing the plaintiff to work at any circu-

lar saw, then clearly it is not relieved of the consequences of its act by employing the plaintiff at a machine which was defective. The employment of the boy at a defective and dangerous machine without warning aggravated the negligence. If the looseness of the gauge contributed to the injury, it was simply a concurrent cause, condition, or circumstance in the chain of events resulting in the injury, not the efficient cause. *Winchel v. Goodyear,* 126 Wis. 271, 105 N. W. 824; *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563. It is clear that in setting the plaintiff at work at the circular saw in violation of the section quoted the defendant was guilty of negligence as a matter of law, because the section was unquestionably framed for the protection of such boys. *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041; *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563. If this act of negligence was the proximate cause of the boy's injury, without contributory negligence on his part, there must be a recovery, and, if such proximate causation appears as matter of law, then the finding of the jury on that question is immaterial.

It is undisputed that the plaintiff's injury was the immediate result of physical contact with the prohibited saw while he was at work. Two of the elements of proximate causation are therefore shown without dispute: First, that the defendant was guilty of a negligent act; second, that as a result of that act the plaintiff suffered injury. The only other element necessary to complete the claim of proximate causation is the fact that some injury to the boy should have been reasonably anticipated by the defendant as the natural and probable result of setting him at work at the saw. This latter necessary element must be held to be conclusively established by the law itself. The prohibition of the employment of boys about such machines as are dangerous to life and limb amounts to a declaration that such employment is likely to result in physical injury to the boy, and an employer must in all reason be held

to know what the legislation has thus declared. The element of anticipation of injury as a natural and probable result of the violation of the law is therefore supplied. Cases like *Kutchera v. Goodwillie,* 93 Wis. 448, 67 N. W. 729, and *Goodwillie v. London G. & A. Co.* 108 Wis. 207, 84 N. W. 164, where the law under consideration was not a law forbidding employment of a minor at a given machine, but only forbade his employment generally in a certain occupation, have little bearing upon the present case. In these cases as well as the cases where the alleged negligence consists in the violation of some rule of conduct such as the law regulating the speed limit for locomotives within city limits, it may often be that the violation of the statute, though negligence *per se,* may not be the proximate cause of the injury. But when, as here, the law forbids the employment of a minor at a certain definite machine, and in violation of that law the defendant employs the minor at that machine, and that machine during the employment inflicts injury on the minor, the chain of proximate causation from the negligent act to the injury is complete as matter of law.

Error is assigned upon the charge. On the question of damages the court charged the jury as follows:

"You will assess such sum as will fairly and reasonably compensate the plaintiff for the pain and suffering the injury caused him, the humiliation or mental suffering, if any, the deformity has caused him, and such, if any, as it will cause him in the future. Such inconvenience it has caused, and such, if any, as it will cause him in the future, the extent, if any, to which it has diminished his earning capacity, and the extent, if any, to which it has affected his ability to play the piano or engage in other pastimes."

The particular part of the charge complained of is the following: "The extent, if any, to which it has diminished his earning capacity." Complaint is made that, there being no proof of manumission and the plaintiff not being entitled to his earnings during minority, the jury under this charge was

liable to award damages on account of loss of earning capacity during minority. But the charge was correct so far as the earning capacity was concerned after manumission or majority. So it cannot be said that the charge was incorrect as far as it went, and if the defendant required a more specific charge upon the subject it should have requested it, which it failed to do. In view of the whole record we cannot say that defendant was prejudiced by the charge complained of. We find no prejudicial error in the record, therefore the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

LADWIG, Respondent, vs. JEFFERSON ICE COMPANY, Appellant.

November 13, 1909—January 11, 1910.

(1, 2) *Expert testimony: Weight: Competency.* (3–5) *Master and servant: Negligence: Injury to servant: Mode of work: Simple appliances: Assumption of risk.*

1. The opinions of experts, so far as they clash with common knowledge or ordinary observation of simple implements, should not be given weight or credence.
2. Expert testimony directed to ordinary phenomena easily observable by any one of ordinary intelligence is unnecessary and improper.
3. It is not negligence upon the part of the master to lay out a particular mode of doing his work or to furnish particular appliances therefor, where neither such mode nor such appliances are inherently or latently dangerous.
4. When the servant, knowing of such mode and of such appliances, enters and continues in the service, he assumes the ordinary risks thereof arising from such mode which he knows by ordinary observation, and from such appliances which are simple in their construction and not worn out, broken, or defective.
5. Thus, the risk of injury through the falling of a bracket and the scaffold supported thereby upon which he was working was as-

sumed by a carpenter who had entered and continued in the service with full knowledge of the mode in which the work was carried on, and had, with his fellow workmen, made, placed in position, and fastened up the brackets (which were simple, easily understood, and not defective), and might have exercised his judgment as to the safety of the mode of hanging them, and might have braced up the bracket in question by such additional contrivances as common sense would suggest, including, if necessary, a scantling from the floor to the outer side thereof.

APPEAL from a judgment of the county court of Walworth county: JAY F. LYON, Judge. *Reversed.*

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

Calvin Stewart and *Wallace Ingalls,* for the respondent.

TIMLIN, J. The plaintiff was injured by the fall of a scaffold or staging upon which he was working in the interior of an icehouse at a height of about twenty-two feet above the floor. This scaffold or staging was fastened against the inside wall of the icehouse and consisted of two triangular brackets about ten feet apart with a two-inch plank running across and resting upon their upper surfaces. The controlling facts are without dispute. There were thirty of these brackets, all alike. The plaintiff and his fellow workmen constructed the brackets, selected them for use, and attached them to the inside wall. Plaintiff was a carpenter, but not of great skill or long experience. Each triangular bracket had two of its sides inclosing a right angle made of two-by-four inch lumber, while the side opposite this right angle consisted of a brace of the same material connecting the said sides and fastened to them. The sides inclosing the right angle were fastened together at the apex of this angle. One of these sides was three feet long and was used to carry the scaffold. The other side was four feet long, and was held perpendicularly against the wall by a round iron bolt ten inches in length and one-half inch in diameter which passed through both sides of the right angle near its

apex in such direction that it projected downward three and one-half or four inches from the outside of the perpendicular or long side of the bracket and at an angle of forty-five degrees from the latter side. The plaintiff and his fellow workmen were supplied with boring implements, and when in the progress of their work it became necessary to raise the scaffold, they, standing on the former scaffold, would bore a hole higher up into and through the one-inch sheeting boards on the interior of the icehouse, such hole slanting downward and outward in the same direction as the projecting part of the iron bolt before described. They then took a bracket of the kind described from among those furnished, and, raising it up, inserted the projecting portion of said bolt into this hole, bringing the long side of the bracket close to the inside of the wall and perpendicular with it and the short side at right angles with the wall. When two brackets were thus attached the cross-plank was placed thereon and work resumed. This work consisted of stripping off from the interior walls of said icehouse certain boards and scantling which had been inside of the sheeting boards to which the brackets were attached. Such stripping was begun from the bottom; hence the necessity of raising the brackets from time to time when they had stripped off all in reach from their former position, and hence the opportunity and necessity of fastening the brackets to the sheeting boards thus exposed. Stripping was done with an iron bar two or three feet long and adjusted at the ends for drawing nails or prying off boards, and the workmen sometimes, or usually, after getting a hold with this bar, pressed inward toward the wall, thus increasing the outward tendency of their weight on the scaffold and increasing the strain upon the iron bolt.

The plaintiff and another workman after using and erecting the scaffolds so constructed in this work for five or six weeks co-operated and assisted one another at the time in question in boring the holes in the sheeting for the iron bolt, in raising and putting the brackets in place and in placing the plank

thereon, and then together mounted the scaffold which they had thus constructed, commenced again the work of stripping off, and had been so engaged a few minutes when the bracket at plaintiff's end of the scaffold fell, carrying the plaintiff with it and the plank on which he was standing, injuring the plaintiff as stated. Nothing was broken or bent or displaced upon the fallen bracket. It seemed to be in the same condition after its fall as it was when plaintiff, co-operating with his fellow workman, placed it in position. Some loose statements relative to the iron bolt presenting the appearance of having been once bent and straightened relate to its condition as it was when put in place and also after its fall, but furnish no basis for any claim that the bolt gave way by bending and so caused the fall. The hole in the sheeting into which the bolt was inserted was found sound and intact.

Under these circumstances the cause of the fall of the bracket became something of a mystery, which the plaintiff attempted to clear up by the opinions of experts substantially as follows: Olson, a carpenter, who testified to the very obvious conclusion that weight on or near the further end of the horizontal bracket arm would exert a pull away from the wall at the top part of the bracket, and if this pull was greater than the resisting force of the iron bolt or its wooden socket the bracket would come down. Bauerman: That this pull might bend the bolt or split the wood, but if the bolt was not bent nor the wood split he could not account for the fall. Auld: That from vibrations caused by men working on the scaffold this pull would have a tendency to straighten the bolt. Davidson, without knowing what was the cause, would surmise that the bracket as it slipped down the side of the wall by reason of overlying weight, and perhaps vibration, became lodged at the lower end, and consequently there was no hold of it at the upper end, and it fell over. Kappel: That if there was a load placed on the outer end of the bracket it would have a tendency to pull the bolt out, force it up in the timber, and thus let

the bracket come down. Some one or more of these witnesses said that it would not tend to prevent the bolt slipping out of its socket if the upright arm of the bracket had been nailed to the sheeting. But this is obviously incorrect.

In his opinion denying a motion to set aside the verdict the learned county judge said:

"The evidence of the expert witnesses showed clearly to me that the bracket was simply a lever of which the lower end was the fulcrum, the bolt was the weight, and the person standing thereon was the power. The power was also increased by the pressure that the person exerted in forcing off the siding, etc. . . . It would seem that the bolt in disengaging itself and leaving the siding would be describing a circle the diameter of which was practically three feet, and that the end of the bolt would have to rise very slightly in order to pass through the hole."

It does not add much to ease of understanding the problem presented to translate it into the terms of the mechanical powers, for all agree there is some strain of the upper part of the bracket in a direction away from the wall on which the bracket is hung. Hence the iron bolt and the socket hole for it. Every person of ordinary intelligence knows this, and the plaintiff knew it when he bored or assisted in boring the hole in the sheeting and when he hooked into the hole or assisted in hooking into this hole the downward projecting iron bolt. But the so-called lever described by the learned county judge presented a mechanical disadvantage rather than an advantage, because his weight was between his fulcrum and his power and nearer to the latter. The bolt in leaving its socket would not follow the arc of a circle whose diameter was three feet, and would need to move upward more than slightly before it could leave its socket. If the lower end of the upright side of the bracket were fixed in position and could not descend, and sufficient power was applied downward and at the outer end of the short arm where it would be most effective, the upper corner of the bracket leaving the wall would de-

scribe an arc of a circle whose center would be the lower end of the upright arm and whose radius would be four feet in length, while the lower end of the projecting bolt would also describe the arc of a circle having the same center, but a radius so much shorter as the lower end of this projecting bolt was below the upper end of the upright side of the bracket measuring along said upright. If there was nothing else to raise the bracket as a whole, the bolt must bend, break, or tear through more than two inches of wood in order to escape. But the fallacy in this kind of computation is that the lower end of the upright side of the bracket does not remain fixed. It also descends with the weight. The weight is not applied at the outer edge of the short arm. It is applied nearer to the wall. Following the viewpoint of the learned county court, the fulcrum is farther from the weight than is the power. How much farther cannot be known without evidence of the exact location of the cross-plank and the place where plaintiff stood at the time of the fall. The weight is applied downward on the whole bracket, and had the exact data for computation been given it would be shown by approved formulæ that the proportion of the whole weight, or power, whichever we choose to call it, which exerted itself to pull out the iron bolt, was small. Neither could the iron bolt raise in its socket merely by the application of downward pressure on the short arm of the bracket.

These are all very simple and obvious considerations known to every person of ordinary intelligence, and the county judge should not have given weight or credence to the opinions of the experts so far as they clashed with common knowledge or ordinary observation of simple implements. When the expert evidence is directed to ordinary phenomena easily observable by any person of ordinary intelligence it is unnecessary and improper, and in the case at bar, where it departed from this, it was demonstrably incorrect. It having been shown by uncontroverted evidence on the part of the plaintiff that the

bracket in question was properly placed with the projecting bolt in its socket and the upright side of the bracket close to the sheeting, and by uncontroverted evidence on the part of the defendant that the bracket was in its normal or usual good condition immediately after its fall and that there was no giving way of the socket, no other efficient cause for the fall of the bracket remains except the exertions of the plaintiff with his iron lever or bar with which he was at work on the scaffold near this bracket when it became detached and fell. It does not appear whether plaintiff was sitting or standing upon the scaffold at the time of the accident. But it does appear that he was obliged at times while on the scaffold to exert considerable power on his bar pushing toward the wall, and this might by jerking, frequent repetition, and great exertion gradually work the iron bolt up out of its socket.

But in any event the case presents the question of a master conducting his work in his own way with simple appliances made, placed in position, and fastened up and easily understood by plaintiff and his fellow workmen. There was no latent or concealed defect in these appliances. They were made of no defective material, and their construction and use were obvious. The plaintiff chose to enter into, and continue in, the service with full knowledge of this mode of carrying on the work. He, with his fellow workmen, was intrusted with the placing of the brackets and the construction of this scaffold, and he was at full liberty, and had ample opportunity, not only to exercise his judgment as to the safety or sufficiency of this mode of hanging the brackets, but also to brace up this bracket by such additional or supplementary contrivances as common sense would suggest, including, if necessary, the placing of a scantling as a brace from the floor to the outer side of the bracket. This would constitute assumption of risk if we were able to find any omission of duty on the part of the master. It is uncontroverted that instructions were given out to the workmen generally that the upright

arm or side of the bracket should also be nailed to the sheeting. Plaintiff did not hear these instructions, although he appears to have been present and one of a group to whom they were communicated. But it appears that this precaution of nailing the upright side of the bracket against the sheeting in addition to inserting the iron bolt in its socket as before described was at the work under consideration sometimes taken and sometimes omitted. It was omitted on the occasion of placing the bracket the fall of which caused the plaintiff's injury. Under these circumstances there was no negligence shown on the part of the employer, but rather a lack of due precaution on the part of the plaintiff, perhaps not amounting to contributory negligence in law, but potent to sustain a finding of contributory negligence had such finding been made.

We prefer to rest this case upon the rule that no negligence on the part of the master is shown. For what has it done or omitted? It is not negligence upon the part of the master to lay out a particular mode of doing his work, or to furnish therewith particular appliances for doing his work, where neither such mode nor such appliances are inherently or latently dangerous. When the employee, knowing of such mode and of such appliances, enters the service and continues in the service of his employer, he assumes the ordinary risks of such service arising from such mode which he knows by ordinary observation, and from such appliances, which are simple in their construction and not worn out, broken, or defective. This is stating the rule for the instant case, and rather more strongly against the employer than the authorities warrant. Without going to the length of disregarding established rules, we can see no liability on the part of defendant. *Peffer v. Cutler,* 83 Wis. 281, 53 N. W. 508; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 79 N. W. 22.

By the Court.—Judgment reversed, with directions to dismiss the complaint.

KERWIN and BARNES, JJ., dissent.

MANNING, Respondent, vs. GALLAND-HENNING PNEUMATIC MALTING DRUM MANUFACTURING COMPANY, Appellant.

December 7, 1909—January 11, 1910.

Patents: Contract with licensee: Action for breach: Jurisdiction of state courts: Grant of exclusive rights: Implied agreements: Breach: Joinder of causes of action.

1. If the same act which is an infringement of a patent is also a breach of a contract with the assignee of the patent or one holding an exclusive license thereunder, such licensee or assignee may ignore his right under the federal statutes to recover for the infringement, and may bring his action in a state court for damages for the breach of contract.
2. A contract granting an exclusive right to make, use, and vend a patented article in specified territory includes an implied agreement that the grantor will not so act as to prevent the grantee from enjoying such exclusive right; and an invasion by the grantor of such territory and of the exclusiveness of the grantee's sale therein is a breach of the contract.
3. The cause of action to recover damages for the breach of such an implied agreement is strictly one arising out of contract and hence, under sec. 2647, Stats. (1898), may be joined with other causes of action on contract.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Appeal by defendant from order overruling demurrer to the complaint on the ground of misjoinder of actions. The complaint in one count alleges, in substance, the following: That in and prior to 1891 the defendant was the owner of letters patent covering a certain drum system of pneumatic malting and the machinery and process thereof, known as the Galland-Henning patent drum system; that on March 7, 1891, for a present money consideration, said defendant granted, through certain assignors, to a New York corporation the sole, exclusive, absolute, and entire right, free from any claim for royalty or other charge or incumbrance, to use, manufacture, and vend, within the state of New York and other named states, and to grant such rights to others in said states,

the machinery and processes covered by said patent for the life of said patent or any renewal thereof, the defendant being in the business of manufacturing apparatus under said patent for sale in other territory; that said licensee corporation, called the Buffalo Company, in 1895 passed into the hands of a receiver in dissolution proceedings, and that in November, 1898, a further agreement in writing was made by defendant with said receiver, Osterhout, to the effect that the defendant should and would proceed to the prosecution of suits against all infringers of said patent rights at its own cost and expense, and would pay over to said Osterhout all proceeds of such prosecutions less the costs and expenses thereof; also providing that pending such litigation the defendant might sell the patented articles within the assigned territory, but should pay to said receiver a royalty of twelve and one-half per cent. of the sale price. It is alleged that said receiver on or about October 21, 1903, transferred to this plaintiff all his rights and rights of action under either and both of said contracts, which transfer was intended to and did terminate the rights of defendant under said contract of November, 1898, and the plaintiff is now the sole owner of all licenses, patent rights, claims, and causes of action, and of all rights, claims, and demands which at any time had accrued to said Buffalo Company or said receiver; that defendant did prosecute infringers and did collect large sums of money for which it is accountable under said agreement of 1898, the amount thereof unknown to plaintiff. Further, that defendant subsequent to the license agreement of 1891, and both prior and subsequent to the making of the contract of 1898, sold the patented devices and improvements in the assigned territory to numerous parties, some of whom are named, and others asserted to be unknown to the plaintiff, and that since the transfer from the receiver to the plaintiff the defendant has continued to so sell; that defendant has failed to pay the plaintiff or any one else the agreed royalty upon the sales made during the continuance

of the contract of November 30, 1898, or the proceeds of the infringement prosecutions, notwithstanding due demand for such accounting and payment; and that the defendant threatens to continue to act under the agreement of November 30, 1898, by undertaking prosecutions and by selling patented articles in the transferred territory, for which plaintiff has no adequate remedy, and prays relief, first, that defendant account for all moneys collected in prosecution of infringements; second, for all sales made in the territory since the contract of November 30, 1898, "in order to determine the royalty thereon at twelve and one-half per cent.;" and third, that the defendant account for all drums sold within said territory since the making of the contract of March 7, 1891, and prior to the making of the contract of November 30, 1898, and after the termination of the contract of November 30, 1898, "for the purpose of determining the damages sustained by this plaintiff by reason of the sale of said drums;" and also that after the ascertainment of said sums the plaintiff have judgment therefor, and such further relief as may be just and equitable.

For the appellant there were briefs by *Ryan, Ogden & Bottum,* and oral argument by *L. M. Ogden.* They cited, besides other cases, *Excelsior W. P. Co. v. Pacific B. Co.* 185 U. S. 282, 283, 288–291; *Atherton M. Co. v. Atwood-Morrison Co.* 102 Fed. 949; R. S. of U. S. 1878, sec. 629, subd. 9; *Littlefield v. Perry,* 21 Wall. 205, 223; *Stanley R. & L. Co. v. Bailey,* 14 Blatchf. 510–512; *Continental S. S. Co. v. Clark,* 100 N. Y. 365, 369, 370; *De Witt v. Elmira Nobles Mfg. Co.* 66 N. Y. 459, 461; *Victor T. M. Co. v. The Fair,* 123 Fed. 424, 425.

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *W. F. Adams.*

Dodge, J. The complaint concededly declares a cause of action to recover the amounts agreed to be paid upon the con-

tract of 1898 both for royalties upon sales made by the defendant during the term of that contract and for moneys collected from other infringers of plaintiff's territory. It is not contended that these two grounds of recovery, if they constitute separate causes of action, are not properly joinable, since they are indebtedness promised to be paid by the same contract. *Reindl v. Heath,* 109 Wis. 570, 85 N. W. 495. There is joined in the complaint also a claim to recover the damages to the plaintiff resulting from defendant's alleged conduct in selling machinery covered by the patent in the exclusive territory assigned to plaintiff during periods outside of the term of the contract of 1898. While this as a plain action at law would seem to be a separate and distinct cause of action, although not stated as such in the complaint, it is claimed by respondent not to be such, but merely a claim for additional relief upon the single primary cause of action for an accounting by the defendant as to its conduct and the results thereof. Passing this controversy, however, and assuming for the purpose of the argument that it is distinct and separate, the proposition to be considered is whether it is one which can be joined with that or those first stated. Appellant claims not, because it is an action for infringement of a patent, *ex delicto* in character and cognizable exclusively by the federal courts. Our statute (sec. 2647, Stats. 1898) permits the joining of two or more causes of action upon contract, whether they be in law or equity, or both. *Kruczinski v. Neuendorf,* 99 Wis. 264, 74 N. W. 974; *Emerson v. Nash,* 124 Wis. 369, 382, 102 N. W. 921; *Krakow v. Wille,* 125 Wis. 284, 103 N. W. 1121. If therefore it shall be found, as respondent claims, that the questionable cause of action, namely, for damages, is on contract, there is no misjoinder. We proceed to consider that question.

When the assignee of a patent, or one holding an exclusive license thereunder, suffers from its infringement by any one, he doubtless can avail himself of this federal statute and

bring his suit either in law or in equity for his damages from the infringement, which under the federal law and practice may include not only the damage to himself which he can prove, but even the profit to the infringer; and in such action the court may inquire into the validity and construction of the assignment or license for the purpose of ascertaining plaintiff's title and right to maintain suit (*Excelsior W. P. Co. v. Pacific B. Co.* 185 U. S. 282, 22 Sup. Ct. 681); but in such suit nothing more is recoverable against the assignor than against any stranger under no contract relation. If, however, the same act which is an infringement of the patent is also a breach of some contract, the plaintiff may ignore the statutory right to recover for infringement and bring his action for damages proximately resulting from the breach of the contract, and of such action the federal courts have no exclusive jurisdiction. *Excelsior W. P. Co. v. Pacific B. Co., supra; Hartell v. Tilghman,* 99 U. S. 547, 552; *Albright v. Teas,* 106 U. S. 613, 1 Sup. Ct. 550; *Williams v. Star S. Co.* 35 Fed. 369. Plaintiff's license in this case granted him the exclusive right of manufacture and sale in the specific territory. It thereby doubtless vested him with sufficient title to the patent to sue for infringement thereof, albeit in the patentee's name, under federal statutes. *Brush E. Co. v. California E. L. Co.* 52 Fed. 945; *Littlefield v. Perry,* 21 Wall. 205, 223. But the grant from defendant to plaintiff's assignor was also a contract. It granted an exclusive right to make, use, and vend. In all contracts granting property rights, or rights of conduct, there is an implied agreement on the part of the assignor that he will do no affirmative act to derogate from his grant. That is implied in the very grant itself. In the nature of things it is inconceivable that the minds of the parties have met on basis of a grant of something and, at the same time, on negation of that grant, in whole or in part. This principle is very old in the law and has been applied to a great variety of circumstances; in many cases being carried to the

point of declaring to be implied covenants going much further. The grantor or lessor of land, in absence of statute, covenants for the quiet enjoyment of the property demised, and, even where statutes have negatived such implication, he is still held to have covenanted not to derogate from such grant by his own acts. A contract for exclusive agency implies that the principal will commit no act invasive of the exclusiveness of such agency. The grantor of an exclusive license under a patent is in the same position and subject to the same rule, as has often been decided. *Eldred v. Leahy,* 31 Wis. 546; *Shaft v. Carey,* 107 Wis. 273, 83 N. W. 288; *John O'Brien L. Co. v. Wilkinson,* 117 Wis. 468, 94 N. W. 337; *W. G. Taylor Co. v. Bannerman,* 120 Wis. 189, 97 N. W. 918; *Olson v. Viroqua,* 121 Wis. 571, 574, 99 N. W. 326; *Halsey v. Waukesha Springs S. Co.* 125 Wis. 311, 104 N. W. 94; *Kipp v. Smith,* 137 Wis. 234, 240, 118 N. W. 848; *Birdsall v. Perego,* 5 Blatchf. 251, Fed. Cas. No. 1,435; *Faulks v. Kamp,* 3 Fed. 899, 901; *Brush E. Co. v. California E. L. Co.* 52 Fed. 945; *Philadelphia, W. & B. R. Co. v. Howard,* 13 How. 307, 342; Rawle, Cov. for Title, §§ 270, 287; *French v. Bent,* 43 N. H. 448; *St. Louis & D. L. & M. Co. v. Tierney,* 5 Colo. 582; *Morier v. Moran,* 58 Ill. App. 235; *Gay & Co. v. Blanchard,* 32 La. Ann. 497, 504; *Black v. Woodrow,* 39 Md. 194; *Eliot Nat. Bank v. Beal,* 141 Mass. 566, 569, 6 N. E. 742; *Smith v. Boston, C. & M. R.* 36 N. H. 458, 494. We think that principle clearly controls the present situation. When defendant granted to plaintiff's assignor exclusive rights, it just as surely and completely by that grant agreed that it would not so act as to prevent him from enjoying such exclusive right. When, as alleged in the complaint, it invaded his territory and the exclusiveness of his sale in the same it broke that contract. An action to recover damages therefor is strictly an action on contract. It is maintainable whether any valid patent is infringed or not. There is in our opinion no escape, therefore, from the conclusion that if

the causes of action are separate they are nevertheless such as by virtue of our statute might be joined in the same complaint, and that the demurrer to that pleading on the sole ground of misjoinder was properly overruled.

By the Court.—Order affirmed.

St. Hyacinth Congregation, Respondent, vs. Borucki, Appellant.
Same, Respondent, vs. Rakowski, Appellant.

December 7, 1909—January 11, 1910.

Injunctions: Mandatory: Temporary: When issued: Religious societies: Removal of officers: Compelling delivery of books, etc.: By-laws: Constitutional law: Roman Catholic church: Freedom of worship: Special corporate powers: Continuance of injunction: Undertaking.

1. Courts of equity have power to issue mandatory injunctions.
2. Sec. 2774, Stats. (1898), relating to temporary injunctions, contemplates their issuance in all cases where a party's rights cannot be effectually vindicated unless the opposing party be restrained from so acting or proceeding in such a way as will clearly tend to defeat the object of the suit.
3. In an action by an incorporated congregation of the Roman Catholic church to compel, by injunction, a former officer thereof, who claimed that he was still such, to turn over to his successor the books and property of the congregation in his possession and to restrain him from acting as such officer, where the facts were practically undisputed and the rights of the parties were as completely before the court upon an application for a temporary injunction as they would be after a trial, and it appeared that defendant was not entitled to the office and that if he were permitted to hold it during the pendency of the action the plaintiff would be defeated in the principal object of the action, which was to obtain control of the administration of its affairs, the court properly issued a temporary injunction in accordance with the prayer.
4. The provision in sec. 2001—12, Stats. (1898), that the two laymen selected under sec. 2001—10 as directors of a Roman Cath-

olic congregation "shall be and remain members of such corporation for the term of two years and until their successors . . . are chosen or selected as provided by the by-laws," relates to the two laymen first chosen as directors for the first two years of the corporation.

5. By-laws providing that the lay directors selected shall be approved by the archbishop; that they may at any time be removed from office by a majority vote of the board of directors; and that the board may fill the vacancies thus created, are within the authority given by secs. 2001—10 to 2001—17, Stats. (1898).

6. Secs. 2001—10 to 2001—17, Stats. (1898), authorizing the incorporation of congregations of the Roman Catholic church, with provisions for their organization and government different from those applicable to other religious societies, are in accordance with the constitutional guaranties of freedom of worship and liberty of conscience (Const. art. I, sec. 18). They do not grant special corporate powers or privileges in contravention of sec. 31, art. IV, Const.; nor do they deny to any person the equal protection of the laws in violation of the XIVth amendment to the federal constitution.

7. Under sec. 3061, Stats. (1898), the trial court had power upon denying a motion of defendants to vacate a temporary mandatory injunction, and upon defendants' application for a stay of proceedings pending an appeal, to order that such injunction should continue in force on condition that plaintiff give an undertaking to abide and perform any final judgment that should be rendered in favor of defendants.

APPEALS from orders of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The respondent is an incorporated congregation of the Roman Catholic church. From January, 1905, to January, 1909, the appellants were the duly elected and qualified directors, and the secretary and treasurer, respectively, of the congregation. They claim to have been lawfully re-elected on January 10, 1909, and to be entitled to hold the offices of directors, and secretary and treasurer, respectively, until January, 1911. The complaints allege plaintiff's incorporation as a church, with a membership of about 1,000 families, property amounting to about $200,000, and having an annual income and annual disbursements of about $17,000. It is al-

leged that the business affairs of the congregation are administered by a board of directors, consisting of the archbishop, the vicar general of the diocese, the pastor of the congregation, and two lay members of the congregation elected by the congregation and qualified by the approval of the archbishop and subject to removal by a majority vote of the board of directors if they deem such removal for the best interests of the congregation. The activities of the congregation, their extent and importance, are alleged, as are the importance of the books of account in which the sources of revenue are recorded. It is alleged that the secretary and treasurer have exclusive access to the books of account, the moneys, funds, and evidence of indebtedness of the corporation, and that they have control thereof. The election and qualification of the defendants for the respective offices from January, 1907, to January, 1909, is set forth.

It is further alleged that in 1908 the members of the board of directors, exclusive of the lay members, received information that the treasurer had not accounted for all the moneys intrusted to him, and that with the knowledge of the secretary he had falsified his annual reports for the years 1906 and 1907 so as to make it appear that all the moneys had been accounted for, and that the defendant *Rakowski,* in a proceeding pursuant to sec. 4096, Stats. (1898), in an action commenced against him and his bondsmen, admitted that his annual reports for these years were not true and correct to the extent of about $585, and that he had made these incorrect reports with the knowledge of the secretary. It is alleged that, because of the shortage and the falsification of the accounts by the treasurer with the knowledge of the secretary, the archbishop did not approve defendants' alleged election on January 10, 1909, to succeed themselves in their respective offices.

The complaint alleges that at a meeting of the board of directors on January 15, 1909, by a majority vote of the direct-

ors, the defendants were removed from the offices of lay directors and of secretary and treasurer, and that the vacancies thus caused were filled by the election of Frank Cichocki and John Maciolek as lay directors, and that Frank Cichocki was designated as secretary and John Maciolek as treasurer; that the secretary and treasurer so elected by the board of directors have qualified; that they have demanded from the defendants the books and other property of the plaintiff, to the possession of which they were entitled; and that the defendants have refused to comply with the demands. It is claimed that their continued refusal and failure to surrender possession of such books and property to the secretary and treasurer so elected to fill the vacancies caused by the removal of the defendants will result in irreparable injury to the plaintiff.

The plaintiff prays for temporary injunctions commanding each of the defendants to turn over to his successor the books and other property of the congregation and for orders restraining them from acting as lay directors and forbidding them to interfere with their successors as such lay directors. Permanent injunctions to the same effect are also asked. Temporary injunctions, as prayed for in the complaints, were granted without notice to the defendants.

Upon the serving of the summons, complaints, and injunctional orders the defendants immediately applied for a vacation of so much of the injunctional orders as was mandatory in terms and effect. Before the applications were heard, the answers to the complaints were served.

The defendants admit that the temporal business of the plaintiff is administered by a board of directors composed as alleged in the complaint; that the by-laws of the corporation provide that an election of a lay director shall not be valid and effective unless approved by the archbishop of the archdiocese; that under the by-laws a majority vote of the board of directors may remove a lay director from the office of secretary or treasurer and from the position of director, and that the di-

rectors may by a majority vote fill the vacancies thus created; but they allege that such organization of the board of directors and the by-laws are void because the legislation which attempts to confer such powers is unconstitutional. The answers allege that, by receiving a majority of the votes cast at the annual meeting of the congregation on January 10, 1909, the defendants were duly elected as the lay members of the board of directors, but the defendants admit that such alleged elections have not been approved by the archbishop. It is also alleged that they are the lawful lay directors by reason of being holdover officers, in case they are not qualified because their elections have not been approved by the archbishop.

It is further alleged that prior to April, 1907, the moneys of the corporation were kept in the parsonage of the congregation in an inner compartment of a safe for which the treasurer had a key. but it is alleged that neither the treasurer nor the secretary had the combination of the safe nor a key to the inner door. In the last months of 1906 the defendants and the four assistants or lay consulters of the congregation discovered that there was a discrepancy, amounting to $552, between the balance shown on the books of the corporation and the amount actually in the possession of the treasurer. The answers further aver that, since neither of the defendants had converted any moneys belonging to the congregation to his own use, the shortage was either due to an error or was caused by some person other than the defendants who had access to the safe.

The provisions of the articles of incorporation and the by-laws under which the board of directors of the plaintiff is organized and by which certain powers are conferred upon the directors are alleged to be violative of the state and federal constitutions, in that they violate art. IV, sec. 31, of the state constitution, by which the legislature is prohibited from enacting any special or private laws granting corporate powers or privileges, except to cities; of art. I, sec. 18, which prohibits any preference being given by law to any religious establish-

ments or modes of worship; and of the XIVth amendment to the federal constitution, which provides: "Nor shall any state deprive any person of . . . property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The defendants plead as a counterclaim to the actions that the acts of the board of directors were done to embarrass the defendants in the performance of their duties as lay directors and as secretary and treasurer of the congregation, and they therefore pray that the complaints be dismissed and that the plaintiff and its officers be restrained from interfering with the defendants in the performance of the duties of their respective offices. Based upon the answers of the defendants, an order issued to show cause why the temporary injunction prayed for in the answers should not be granted.

By consent of the parties the motions to vacate the temporary injunctions issued in behalf of the plaintiff and the motions to grant the temporary injunctions asked by the defendants were heard together. Both motions in each case were refused, and upon defendants' applications for a stay of proceedings pending appeal the court ordered that the temporary injunctions issued in plaintiff's behalf should continue in force on condition that the plaintiff give an undertaking in the sum of $1,000. Under the orders of the court the defendants have surrendered their offices and the books and property mentioned in the complaints.

The defendants appeal from the orders of the court refusing to vacate the mandatory provisions of the temporary injunctions issued in behalf of the plaintiff, from the orders denying defendants' motions for restraining orders during the pendency of the action, and from the orders which continue during the stay of proceedings the injunctions issued in plaintiff's behalf on condition that the plaintiff give the undertaking as directed.

A. C. Umbreit, for the appellants.

For the respondent there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

SIEBECKER, J. The power to issue mandatory injunctions is recognized as an appropriate function of courts of equity. In *In re Lennon,* 166 U. S. 548, 17 Sup. Ct. 658, the court, speaking of a preliminary injunction which was assailed as unwarranted because it was mandatory in its character, states:

"Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things and to prevent an arbitrary breaking off of the current business connection between the roads. But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it." See, also, Bispham, Principles of Equity, § 400; Pom. Eq. Jur. § 1359, note.

Sec. 2774, Stats. (1898), contemplates the issuance of temporary injunctional orders in all cases where it appears that a party's rights cannot be effectually vindicated unless the opposing party be restrained from so acting or proceeding in such a way as will clearly tend to defeat the object of the suit. *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 93 N. W. 473. See cases cited.

The question arises: Does the record now before us disclose a case wherein this power should be applied to protect the plaintiff in its rights? The facts of the case are practically without dispute. In so far as the rights of the parties are properly within the jurisdiction of a civil court, there is no dispute in the facts respecting the defendants' status as corporate officers of the congregation. It is conceded that their election as members of the board of directors in January, 1909, was not approved by the archbishop as provided by the by-laws of the corporation; that the majority of the directors at a regular meeting removed them from office; and that the vacancies thus created were filled by the appointment of others

from the lay membership of the practical communicants of the church. If the action of the board of directors in these respects, authorized by the articles of incorporation and the by-laws, was lawful, then on the application for preliminary injunctions the rights of the respective parties to the controversy were as completely before the court as they would be at any stage of the trial and final judgment.

It is argued that the order issued is mandatory in its terms and operates to disturb the *status quo* of the controversy, in that it directs defendants forthwith to surrender and deliver up to the persons selected by the directors as their successors in office the books, money, papers, and all other articles belonging to the congregation and now in their possession; and in that it restrains them from further control over them and from exercising any of the functions or performing any of the duties of the offices of directors and of secretary and treasurer of the corporation; and in that this order in effect determines the whole controversy, which should only be adjudicated in the final judgment in the action. The propriety of this preliminary order depends upon the rights of the parties under the exigencies of the situation presented to the court. The inquiry first in order pertains to the right of the defendants to continue in office under the facts and circumstances shown. It is contended that their rights to hold the offices cannot be determined in this preliminary proceeding, but must be held in abeyance until final judgment is awarded. As stated, the facts admitted by the defendants present at this stage of the case the question of their right to continue in office, and constitute the basis for an adjudication of this preliminary question as well as that for final judgment. There is no circumstance in the case to furnish a ground for preventing the court from fully determining the questions involved or which demands postponement of their consideration for the protection of the rights of the parties. It clearly appears that if the defendants are not entitled to hold the offices to which they claim

title, but continue to hold them during the pendency of the action, the plaintiff will be well nigh deprived of substantial redress, for the plaintiff's principal object in this action is to obtain possession of the corporate offices and to control the administration of the affairs of the congregation by the persons selected for the purpose.

The primary question, therefore, is: Does the record show that a trial must be had to ascertain the facts and circumstances establishing the right of the plaintiff to the possession of the books and other articles of the congregation? There is no dispute that the archbishop did not approve, as required by the by-laws, the defendants' selection in 1909 as the lay members of the board of directors by the members of the congregation, and that the board of directors by a majority vote removed them from the offices and selected two qualified lay members to fill the vacancies thus created in the offices. If the archbishop and the board of directors possessed authority to act for the corporation in these respects, it is obvious that the defendants had no right to continue in office and in control of the affairs of the congregation, and that the court properly granted the preliminary relief to prevent a continuance of the wrongdoing of the defendants which would defeat the object of the suit.

It is averred that the terms of the statutes granting authority to Roman Catholic congregations to incorporate confers no power to prescribe by-laws providing that the archbishop must approve the selection by the members of the congregation of the lay members of the board of directors to entitle them to hold the office, and providing that a majority of the members of the board of directors may remove such members from office if such majority deem it necessary for the best interests of the corporation. The statutes on this subject are embraced in secs. 2001—10 to 2001—17, Stats. (1898). Sec. 2001—12 provides that the two laymen selected under sec. 2001—10 as trustees "shall be and remain members of said corporation

for the term of two years and until their successors, who in all cases shall be laymen, are chosen or selected as provided by the by-laws." Under sec. 2001—15 "the directors, by unanimous vote, may adopt such by-laws, not contrary to the constitution and laws of this state, the statutes of the diocese and the discipline of the Roman Catholic church, as may be deemed necessary for the proper government of such corporation and the management and business thereof or the temporal affairs of such congregation which may become connected therewith or attached thereto." These provisions manifestly make the two laymen, first chosen under sec. 2001—10 from among the members of the corporation, the lay trustees for the first two years of the corporation and until their successors are chosen or selected as provided by the by-laws. The by-laws of the plaintiff concededly require that the lay members selected for trustees shall be voted for by the members of the congregation and approved by the archbishop, and that if a vacancy occurs in the board of directors the vacancy may be filled by the remaining members of the board. We find nothing in the law forbidding this mode of selecting the lay members of the board of trustees and of filling vacancies in the office of trustee. The statute grants authority that the selection of such laymen as trustees shall be "as provided by the by-laws." The by-laws in question are within the authority there granted and are binding on the members of the congregation. The result is that the defendants were removed from office in the manner prescribed by the by-laws and have no right or authority to exercise the functions of the offices of trustees and secretary and treasurer. Up to the time of the injunctional order they wrongfully withheld from their successors the custody and control of such books, papers, moneys, and other articles as were in their possession, and they thereby wrongfully interfered with the administration of these respective offices and the properties and temporalities of the church.

It is contended that the law authorizing the incorporation of the congregations of the Roman Catholic church is not valid legislation because it contravenes the provisions of the state constitution prohibiting the legislature "from enacting any special or private laws . . . for granting corporate powers or privileges, except to cities" (Const. art. IV, sec. 31), and that such legislation is violative of the rule providing for the equal protection of the laws. The statutes embraced in ch. 91, Stats. (1898) (secs. 1990 to 2001—20), authorize the incorporation of religious societies. It is manifest from the contents of the chapter that the legislature, mindful of the constitutional provisions guaranteeing freedom of worship and liberty of conscience (Const. art. I, sec. 18), provided a means by which the various religious societies might become incorporated for the administration of the temporal affairs connected with their ecclesiastic organization. The statute authorizes the incorporation of voluntary religious associations for the support of a place of worship and the maintenance of a ministry in conformity to their religious establishment and their modes of worship, and recognizes that all who unite themselves with such a body consent to be governed by the laws and regulations of the associations. The appellants claim that the law operates to grant special corporate privileges and powers, in that permission is given to different religious associations to administer their ecclesiastical affairs pursuant to their peculiar systems of government and organization. The statute does no more than to take cognizance of the fact that there are voluntary associations with different systems of government to which the members thereof voluntarily consent. The law therefore refrains from imposing any restrictions on the right of the members to frame any form of organization and to adopt any form of government for the conduct of its members and the administration of its affairs not repugnant to the constitution and the laws of the state. This accords with the constitutional guaranties establishing freedom of worship and

liberty of conscience. The provisions of ch. 91, Stats. (1898), grant no special corporate powers or privileges forbidden by the constitution, and it does not deny to persons the equal protection of the laws. The law operates generally and equally throughout the state on all citizens who consent to unite themselves with any of the different voluntary religious organizations.

The point is made that the court erred in allowing respondent to file an undertaking conditioned to abide and perform any final judgment that should be rendered in favor of the appellants. Sec. 3061, Stats. (1898), clearly gives the trial court power to authorize the respondent to file such an undertaking upon the making of the orders in question, and we perceive no error in the action.

The orders appealed from were properly made in both cases and must be upheld.

By the Court.—It is so ordered.

HUMMER, Appellant, vs. MCGEE, Respondent.

December 7, 1909—January 11, 1910.

Contracts: Proposal and acceptance: Mining lease: Agreement as to assignment: Construction: Forfeiture: Statute of frauds: Several writings.

1. Plaintiff, lessee under a mining lease, made three different proposals to defendant to assign the lease and sell the equipment. Two of these gave defendant an option to purchase the equipment at a future date and provided for payment of a monthly rental until that date. It was afterwards agreed between the parties that defendant would accept one of three proposals and that until such acceptance he would pay the expense of development work by plaintiff, required by the lease. Before the time for acceptance had expired, defendant having failed to keep up the payments for development work, that work was discontinued and the lease forfeited. *Held*, that defendant was not

liable for the monthly rental for the equipment, since under the agreement he might have accepted the proposal which did not require payment of rent.

2. No purchase having been consummated, and the lease having been forfeited before the time for acceptance expired, defendant was not liable for any purchase money.
3. Defendant was liable, however, under the agreement for the expense incurred by plaintiff in development work.
4. Although, before making the proposals to defendant, plaintiff had failed during one month to perform the full amount of development work required by the lease, such failure did not *ipso facto* forfeit the lease or terminate his title, since it might be waived by the lessor; nor did such failure constitute an incumbrance on the leasehold.
5. A provision in the lease requiring the approval of the lessor to any assignment did not disable plaintiff from contracting to assign it, and defendant, having had the lease in his possession, presumably contracted with reference to such requirement.
6. Under the statute of frauds of Colorado relating to contracts for the leasing for a longer period than one year or for the sale of any lands (substantially the same as sec. 2304, Stats. 1898), several distinct and separate writings may be construed together as containing all the terms of the contract, though only one of them be signed by the party to be charged. Thus, in this case, proposals by plaintiff to assign a lease, the lease itself, and an undertaking by defendant to accept one of such proposals, taken together, are *held* to satisfy all requirements of the statute.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

H. L. Kellogg, for the appellant, cited *Washburn v. Fletcher,* 42 Wis. 152; *Docter v. Hellberg,* 65 Wis. 415; *Singleton v. Hill,* 91 Wis. 51; *Harney v. Burhans,* 91 Wis. 348; *Van Doren v. Roepke,* 107 Wis. 535; *Beckwith v. Talbot,* 2 Colo. 639, affirmed in 95 U. S. 289; *M'Nitt v. Clark,* 7 Johns. 464; *Norris v. Harris,* 15 Cal. 226; *Patchin v. Swift,* 21 Vt. 292; *Niland v. Murphy,* 73 Wis. 326.

L. M. Jeger, for the respondent.

TIMLIN, J. The plaintiff was lessee of the Gold Bond Consolidated Mines Company under a lease in writing for a term of three years from January 1, 1904. He had power to

sublet or assign subject to the approval of the board of directors of the lessor. The lease contained several covenants, among them to work and mine the demised premises steadily and continuously from the date of the lease, performing and completing in each calendar month during its continuance not less than 100 shifts of work. A shift is one day's work for one man. Upon the violation of any covenant of the lease it was provided that the term should, at the option of the lessor, expire. The plaintiff had performed less than 100 shifts of work in the month of May, 1904, but no forfeiture had been declared or claimed, and he was in possession of and working the leasehold. On May 31, 1904, the plaintiff, the defendant, H. R. King, and Maurice S. Lindholm met in Denver, Colorado, and after some negotiations the plaintiff delivered to the defendant or those associated with defendant the said lease, together with three writings, as follows:

"*Proposition No. 1.* I will assign the lease and retain a $\frac{1}{8}$ interest on the net earnings of the mine, and lease the machinery and mining outfit for $50 per month until January 1, 1905, giving you an option to purchase said outfit on that date for $1,000 less the amount paid as rental, still retaining the $\frac{1}{8}$ interest on net earnings of the mine.

"In presence of H. R. King. GEORGE A. HUMMER.

"*Proposition No. 2.* I will assign lease to you retaining $\frac{1}{8}$ interest in net earnings of mine and give you option to purchase same on January 1, 1905, for the sum of $3,000 payable in cash at that time agreeing to lease all machinery and mining outfit until that date (Jan. 1, 1905) for a monthly rental of $50 per month with the privilege of purchasing the same on January 1, 1905, for $1,000 less the amount paid in the aforesaid rentals. GEORGE A. HUMMER.

"In presence of H. R. King.

"*Proposition No. 3.* I will assign lease and sell all mining outfit machinery, etc., for the sum of one thousand dollars ($1,000) and a further sum of two thousand dollars ($2,000) the latter to be paid in instalments of $\frac{1}{8}$ of the profits of the net earnings of the mine until such sum of $2,000 is fully paid. GEORGE A. HUMMER.

"In presence of H. R. King."

The defendant in the progress of the same negotiation executed and delivered to the plaintiff the following:

"*Proposition.* We severally agree to accept one of the several propositions Nos. 1, 2 and 3 submitted in memo. of agreement to us by *Geo. A. Hummer* on May 31, 1904, concerning the purchase of the Gold Bond mining lease in blocks 6, 7 and 8 in Gold Bond subdivision and until such acceptance we agree to pay the cost and expense of operating 100 shifts per month and other expenses incidental to developing said lease, the said expense, however, not to exceed $500 per month for the actual work of development and straightening shaft, etc. All of which is conditioned upon the assignment or purchase of said lease free and clear of all incumbrance of whatsoever nature. C. A. A. McGee.

"Maurice S. Lindholm.

"In presence of H. R. King."

The propositions of the plaintiff were dated May 31, 1904, that signed by the defendant June 2d; the plaintiff accepted the last-mentioned instrument and agreed to it, and continued in possession of and operating under the mining lease; the defendant and those associated with him made the first payment for work and developing the property for June under the contract above set forth, but failed to pay for July or August; the plaintiff stopped work August 20th, and the lease was forfeited September 17th,—all in 1904. On September 17th the defendant with Lindholm wrote to the plaintiff withdrawing and annulling their propositions of June 2, 1904.

Upon this showing the plaintiff seeks to recover the $50 per month rental, the amount to be paid for the lease and mining machinery and the amount of money that he disbursed for exploring and developing the mine during the month of July.

With reference to the $50 per month rent, it is very obvious the plaintiff has no right of recovery. The contract of defendant was to accept one of the three propositions, thus giving the defendant the option to select. He never selected, and his time for selection had not expired, and one of these propositions contained no requirement for paying rent. As

defendant might have selected this one, he was not in default with respect to rent. Neither could the plaintiff recover anything of the purchase money of the lease or the mining machinery or outfit. No purchase was consummated. There could be only a question of damages. Two of the propositions gave the defendant until January 1, 1905, to select which he would accept, and the third, fixing no time, gave him a reasonable time in which to do so. Before either of these periods had expired and before any selection was made by defendant, the lease was forfeited by the lessor by reason of failure to continue development work on the mine. So that the plaintiff had nothing to convey to defendant on and after September 17, 1904, which date was long prior to the end of the period within which defendant might select which of the three offers he would accept.

But with reference to the covenant on the part of defendant to pay the expenses of development during the period of his option for selection the case is different. The learned circuit court, relying on the statute of frauds of the state of Colorado (Mills's Ann. Stats. § 2021) and its construction by the supreme court of Colorado in *Eppich v. Clifford,* 6 Colo. 493, considered the contract in question was within that statute and therefore invalid. In this we think the learned circuit court was in error. With the three propositions signed by the lessee there was delivered to the defendant the lease proposed to be assigned and which contained a description of the property. There was also delivered to the plaintiff the undertaking on the part of the defendant to accept one of the three propositions. This was accepted by the plaintiff and performance entered upon by both parties so far as paying the expenses of developing the property during the option period is concerned. From the three propositions made by the plaintiff, the lease itself, and the undertaking on the part of the defendant, all the requirements of the Colorado statute and of the case of *Eppich v. Clifford, supra,* are satisfied. 29 Am. &

Eng. Ency. of Law (2d ed.) 850, 851. In *Ryan v. U. S.* 136 U. S. 68, 10 Sup. Ct. 913, it was held that a deed given to the proposed grantee or his agent for the purpose of examination only was sufficient to supply the defective description in the preliminary written contract signed by the party sought to be charged. See, also, *Jenkins v. Harrison,* 66 Ala. 345, and cases cited; *Leonard v. Woodruff,* 23 Utah, 494, 65 Pac. 199. And see *Campbell v. Thomas,* 42 Wis. 437, where there was no preliminary obligation in writing signed by the party sought to be charged. It is never necessary under this statute that the memorandum should consist of a single instrument. Several distinct and separate writings may be construed together as containing all the terms of the contract, though only one of them be signed by the party to be charged.

The failure of the plaintiff to perform the full amount of labor required by the terms of the lease during the month of May did not *ipso facto* forfeit the lease or terminate his title. That default might have been and probably was waived by the landlord, who accepted the benefit of this development work for June and the report of the same. However, this is a matter for proof. It is sufficient for the purpose of this appeal to say that it is not shown that the plaintiff had no title to convey on May 31, 1904, nor would plaintiff's failure to perform the full amount of development work required constitute an incumbrance on the leasehold.

With respect to the provision in the lease requiring the approval of the landlord to any assignment, this stipulation does not disable the tenant from contracting to assign subject to such approval, and an absolute agreement to assign includes an agreement to procure such approval. The defendant had the lease in his possession and presumably knew of this requirement and contracted with reference to it. Upon the evidence the right of the plaintiff to recover for moneys paid out by him in carrying on operations under this lease after June 2, 1904, and up to the time he stopped work, less the amount

thereof received from defendant and those associated with him and limited in amount by the terms of the instrument signed by defendant and Lindholm, would seem to be clear. But the court, having considered the contract invalid under the statute of frauds, made no finding on this amount, the testimony is not very clear thereon, and the defendant may under his answer have a defense of payment in whole or in part to this amount stipulated in the contract signed by him. We therefore consider that the judgment should be reversed and the cause remanded for a new trial.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

HUNHOLZ, Respondent, vs. HELZ and wife, Appellants.

December 8, 1909—January 11, 1910.

Specific performance: Contract to exchange lands: Appeal: Discretion: Adjusting amounts paid for taxes: Costs.

1. An action for specific performance is in a measure addressed to the sound discretion of the court, and where there is no abuse of discretion the judgment will not be disturbed on appeal.
2. Upon enforcing specific performance of a contract to exchange lands it was proper to require payment to defendant of the sum by which the taxes paid by him on his land after the making of the contract exceeded the taxes paid by plaintiff on his land.
3. Where plaintiff was ready, willing, and able to perform on his part an agreement to exchange lands with defendant, and the latter refused to perform, it was proper in decreeing specific performance to award costs to the plaintiff.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This action was brought to enforce specific performance of a contract in writing by the terms of which the plaintiff agreed to exchange a lot and pay $600 for another lot owned by the

defendants, each party agreeing to convey to the other by warranty deed the lot in question. The case was tried by the court, and the court found that the agreement was made; that plaintiff and defendants each were the owners of the lots which they respectively agreed to convey; that the reasonable value of the plaintiff's property at the time of making the contract was between $300 and $400 and the reasonable value of the defendants' property at the same time was between $900 and $1,000; that the agreement for the exchange of said real estate was fair and reasonable and free from any misrepresentations, fraud, or mistake on the part of any of the parties thereto; that on November 10, 1905, the time specified for the delivery of the papers on the exchange of the property, plaintiff was ready, willing, and able to carry out the terms of the agreement and offered to do so, and tendered a warranty deed with full covenants with an abstract of title and offered to pay $600, and defendants refused to perform on their part; that since the making of the contract plaintiff has paid taxes on said real estate for the years 1905, 1906, and 1907, being the sum of $16.50, and the defendants have paid taxes on their real estate for the same years amounting to $247.21.

As conclusions of law the court found that the plaintiff was entitled to judgment decreeing specific performance of the contract and requiring the defendants, upon payment of $600 and the further sum of $230.71, being the difference between the amount of taxes paid by the defendants and by the plaintiff for the three years last past, and the execution and delivery to them of a good and sufficient deed duly executed with the usual covenants of warranty conveying the plaintiff's property described, and an abstract of title as required, to convey to the plaintiff by deed with usual covenants subject to restrictions and conditions contained in deed to them, and that the plaintiff recover costs of the defendants.

Judgment was entered accordingly in favor of the plaintiff against the defendants, from which this appeal was taken.

M. T. Halphide, for the appellants.

For the respondent there was a brief by *Dorr & Gregory,* and oral argument by *Thomas Dorr.*

KERWIN, J. The errors assigned are based mainly upon the sufficiency of the evidence to support the findings. After a careful examination of the record we are convinced that the findings are well supported by the evidence. It is argued by appellants that no proper tender of performance on the part of the plaintiff was shown; that he insisted upon conditions not covered by the contract; that there was a mistake in description of the property in the contract; that costs should not have been awarded against the defendants; and that the judgment is contrary to equity. An action for specific performance is in a measure addressed to the sound discretion of the court, and where there is no abuse of discretion this court will not disturb the judgment. There is nothing inequitable or unfair in the contract, and no reason appears in the record why it should not be specifically enforced. Pom. Eq. Jur. § 1402; *Mulligan v. Albertz,* 103 Wis. 140, 78 N. W. 1093; *Willard v. Tayloe,* 8 Wall. 557. The points made that plaintiff insisted upon terms different from the contract and the claim respecting tender of performance were properly disposed of by the court below upon the evidence. The disposition of the payment of taxes by the court in the findings set up in the statement of facts was entirely proper and fair to defendants and in harmony with the rule laid down by this court. *Cunningham v. Brown,* 44 Wis. 72; *Peterson v. Chase,* 115 Wis. 239, 91 N. W. 687; *Wright v. Young,* 6 Wis. 127. The findings of the court against the contention of appellants respecting the lot intended to be included in the contract cannot be said to be against the clear preponderance of the evidence and therefore cannot be disturbed. *Momsen v. Plankinton,* 96 Wis. 166, 71 N. W. 98; *Cunningham v. Brictson,* 101 Wis. 378, 77 N. W. 740; *Von Trott v. Von Trott,* 118 Wis. 29, 94

N. W. 798; *Chace v. Hinkley,* 126 Wis. 75, 105 N. W. 230. No error was committed in awarding costs against the defendants. The case being in equity, and it appearing that the discretion vested in the court respecting costs in equity cases was not abused, the judgment in that regard cannot be disturbed. *Benson v. Cutler,* 66 Wis. 305, 28 N. W. 134; *Clinton v. Webster,* 66 Wis. 322, 28 N. W. 349; *Carrier v. Atwood,* 63 Wis. 301, 24 N. W. 82; *Nevil v. Clifford,* 63 Wis. 435, 24 N. W. 65.

We think the judgment below was right and must be affirmed.

By the Court.—The judgment below is affirmed.

ELLER, Appellant, vs. MILLER, Respondent.

December 8, 1909—January 11, 1910.

Injunction against judgment on cognovit.

1. An injunction restraining the entry or enforcement of a judgment on cognovit should be granted only when necessary for the efficient protection of the debtor.
2. Such a judgment being subject to be set aside on motion so far as it is excessive, or to be vacated to permit the interposition of meritorious defenses or counterclaims, a mere threat to enter a judgment for an excessive amount upon a judgment note does not warrant an injunction, in the absence of any showing that the holder of the note is insolvent so that claims of the maker against him cannot be collected.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The appeal is from an order vacating a temporary injunction.

The temporary order was allowed on a verified complaint to the effect that the defendant, at the time of the commence-

ment of this action, held plaintiff's judgment note for $9,000, upon which $540 for interest had been paid, and to which certain specified defenses and counterclaims existed, but, nevertheless, he was about to take judgment thereon, ignoring the payment and such defenses and counterclaims, and would do so unless prevented by an injunction, to plaintiff's irreparable loss. Plaintiff sought, by the action, to prevent the threatened judgment and have the rights of the parties in respect to all matters adjudged, and judgment rendered accordingly. Attached to the complaint, as an exhibit, was a copy of a letter written to plaintiff by defendant's attorney informing him that, unless the note should be paid by a day named, judgment would be entered, as stated.

No fact was alleged as to the solvency of defendant, or that plaintiff's claims, so far as legitimate, were not readily collectible at law; nor was any showing made that, in case of a transfer of the note, it would not still be subject to the alleged defenses and counterclaims, and no reason was stated why, in case of an improper or inequitable entry of judgment, plaintiff could not obtain relief by a vacation thereof and permission to interpose the defenses and counterclaims substantially in form and effect as in a legal action.

The temporary injunction restrained the defendant, during the pendency of the action, or until the further order of the court, from parting with title to the note or entering judgment thereon. Defendant moved for a dissolution of the temporary injunction, on affidavit, to the effect, among other things, that the notification to the plaintiff that judgment would be entered, regardless of the payment of interest, was an inadvertence; that there was no such intent and that defendant was solvent and able to respond for any judgment which might, in any proceeding, be rendered against him upon plaintiff's claims.

There was an opposing affidavit, not controverting, however, the claim of inadvertence on defendant's part, nor absence of

intention to take judgment without allowing the payment of interest, nor controverting defendant's statement as to his solvency.

George H. Katz, for the appellant.

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *A. W. Fairchild* and *G. S. Canright.*

MARSHALL, J. The claim is made that equity jurisdiction is invokable, generally, to restrain the enforcement of a judgment on cognovit, citing *United Brethren Church v. Vandusen,* 37 Wis. 54, and that, logically, it is available to prevent an unjust entry of such a judgment.

The learned counsel misapprehends the scope of *United Brethren Church v. Vandusen.* It is often found stated that a judgment on cognovit may be questioned in equity; that relief from injustice in such a case is not confined to such as may be obtained by motion in the proceedings, nor defenses to proceedings to enforce the judgment. *Brown v. Parker,* 28 Wis. 21; *Smith v. Willing,* 123 Wis. 377, 101 N. W. 692. The rule in that regard does not go to the extent of rendering equity jurisdiction available in all cases. It is proper when needed for efficient protection of the judgment debtor, ordinary remedies not reaching the case at all or doing so only inadequately. There is nothing otherwise in either of the cases cited to our attention, decided by this court.

Here, had judgment been entered according to the alleged threat, the court, on motion, would have set it aside as to excessiveness and protected plaintiff, in case of his having meritorious defenses or counterclaims, by opening the proceedings, so far as necessary for that purpose, and permitting proper issues to be formed and tried, as in an action in equity or at law, according to the necessities of the situation. *Jones v. Keyes,* 16 Wis. 562; *Dilley v. Van Wie,* 6 Wis. 209; *Blaikie v. Griswold,* 10 Wis. 293; *Second Ward Bank v. Upman,* 14 Wis.

596. No reason whatever is perceived why appellant could not readily have obtained all needed relief without an independent action in equity.

The circumstance that judgment had not been entered does not give any greater right to equitable interference than would have otherwise existed, since the mere threat to take an excessive judgment did not work any prejudice to appellant. The threat, if carried out, would, as to the excess, have been easily remediable on motion, and no showing was made, as stated, indicating that appellant cannot recover any sum respondent ought, under any circumstances, to credit on the note. Moreover, the uncontradicted affidavit of respondent states such competency.

Furthermore, it appears, uncontradicted, that there was no danger whatever of the entry of judgment for an excessive amount.

It follows, that, whether the court dissolved the temporary injunction for want of equity to warrant the use of its extraordinary jurisdiction, or because, in any event, appellant did not need the temporary injunction for protection from any probable harm; in other words in the exercise of discretionary power, the order was proper.

By the Court.—Order affirmed.

COMSTOCK, Respondent, vs. BUCKLEY and others, Appellants.

December 8, 1909—January 11, 1910.

Bills and notes: Accommodation paper: Payment by person primarily liable: Subsequent transfers: Sale by broker: Repurchase in his own right: Fraudulent sale: Rights of holders.

1. If an accommodation note, after being once negotiated, is paid at maturity by the primary debtor, it is thereby discharged and ceases to have any legal existence, at least as to the accommodation parties. *Marling v. Jones*, 138 Wis. 82, distinguished.

2. If a broker employed to negotiate an accommodation note makes an honest sale thereof within his authority, he may afterwards purchase it back in his individual capacity and thereby acquire a good title which he may again transfer to another.
3. But if the broker fraudulently sells the note and retains the proceeds in pursuance of a general purpose to embezzle such proceeds in fraud of the rights of his principal, he thereby, as between himself and his principal, becomes the primary debtor and cannot thereafter purchase the note so as to acquire the good title which the original transferee had by virtue of being a holder in due course.
4. If, after such fraudulent sale, the broker pays to the transferee the amount due on the note and receives it back, it reassumes in his hands the position it formerly occupied, and he can again transfer it to another, not an innocent purchaser, only within the limits of his own rights and authority.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action upon a promissory note, $2,500, dated April 21, 1900, signed by J. O. & W. S. Buckley, a copartnership, payable to the order of *Thomas F. Somers,* at six months date, with six per cent. interest, and indorsed by *Thomas F. Somers, Charles Buehner, John Graf, Peter J. Somers, John Zilg, C. S. Otjen, H. F. Bosworth,* and *W. E. Haskin* in the order aforesaid. It appeared that said note, so indorsed without any consideration to the indorsers, but for the accommodation of a mining company in which they were all concerned and for which the two *Buckleys* were financial agents, was delivered to Henry Herman, as a note broker, to negotiate and pay over the proceeds to said agents; that said Herman during the life of said note did dispose of the same fraudulently, as claimed, to one Wight, an innocent holder, who paid value to Herman, and concededly obtained good title to the note. Herman, it is claimed, applied the proceeds to his own use without informing defendants that he had disposed of the note. At maturity the note was protested for nonpayment, and shortly thereafter, October 25, 1900, was paid by Henry

Herman and returned to his possession. Thereafter, November 27, 1900, Herman sold said note for value approximating its face to the plaintiff, who had notice of its dishonor, the certificate of protest being attached, and who at the same time entered into an agreement with Herman for a definite date of extension of the time of payment. At the close of the trial, upon these facts, the court directed a verdict for the plaintiff for the full amount. From judgment on such verdict the defendants appeal.

For the appellants there were briefs by *Kronshage, McGovern, Goff, Fritz & Hannan,* and oral argument by *G. D. Goff.*

For the respondent there was a brief by *Roemer & Aarons,* attorneys, and *Henry J. Killilea,* counsel, and oral argument by *Mr. Killilea.*

DODGE, J. The direction of a verdict for the plaintiff is sought to be supported, first, on the authority of *Marling v. Jones,* 138 Wis. 82, 119 N. W. 931, for that, as asserted, the accommodated party, and Herman as its agent, had actual authority, by force of the note itself, to negotiate it, which authority was not limited by the maturity of the note. That rule of law was unambiguously adopted by this court upon weight of authority after carefully reviewing a conflict of decision elsewhere. The right of the creditor was not predicated upon an innocent holder's immunity from equities as between the parties, but upon the view that no equities existed to defeat such a note; that the accommodation makers had, by proper construction of their instrument, agreed to pay any one who should lend the amount of the note to the accommodatee either before or after maturity. This case presents a very marked difference in facts, for here, conceding that Herman acted within his authority, the accommodated party had once been accommodated when Wight lent money upon the note, which afterwards had been paid in full and returned to the original custody, all of which appeared upon the face of the

paper and doubtless was fully notified to any subsequent purchaser by the fact of maturity alone. The question on this branch of the present case is therefore whether the true contract between the accommodation parties to negotiable paper and the accommodatee is that the latter may repeatedly incur indebtedness upon their credit. The rule in the *Marling Case,* that the true construction of the contract authorized the accommodatee to borrow once on the accommodator's credit, even after the maturity of the note, was recognized as highly burdensome to the latter and fraught with much peril of inconvenience to commerce from its naturally deterrent effect on the granting of such accommodations. The weight of authority in favor of the rule, however, was found to be so overwhelming as to overcome the countervailing considerations. No authority, however, has been cited or found in support of the idea that the ordinary meaning of the parties in making accommodation paper extends to repeated use of the accommodator's credit, and the reasons against such a purpose are even more numerous and cogent than those which have caused many courts to pause short of the conclusion reached in *Marling v. Jones.* The accommodated party is of course the primary debtor. It is expected when others by signing accommodation paper become substantially sureties for him, at least as between them and him, that he will pay the debt and protect the sureties from liability. When he does so, and the note returns to his possession, it is hard to conceive any reason why the whole purpose of the transaction is not accomplished, and why the note, at least as to the accommodation makers, does not become discharged and cease to have any legal existence. It is a general rule of law that when an instrument upon which several are liable, some primarily and some secondarily, is satisfied by him who is primarily liable, a complete discharge results. It no longer has legal existence. *Jaffray v. Crane,* 50 Wis. 349, 7 N. W. 300; *Snyder v. Malone,* 124 Wis. 114, 102 N. W. 354; *Northern Bank v. Cooke,* 76 Ky.

340; *Logan Co. Nat. Bank v. Barclay,* 104 Ky. 97, 46 S. W. 675; *Williams v. Gerber,* 75 Mo. App. 18; *Wayne v. Sherwood,* 14 Barb. 633; *Rich v. Goldman,* 90 N. Y. Supp. 364; *Spies v. Nat. City Bank,* 174 N. Y. 222, 66 N. E. 736; *Reichert v. Kœrner,* 54 Ill. 306. That rule of the common law is perpetuated as to negotiable instruments by sec. 1679 of the Negotiable Instrument Act (Supp. 1906; Laws of 1899, ch. 356). People are presumed to act in the light of such rules of law. Obviously, however, if the limit of the right to pledge the credit of the accommodation makers is not fixed thus, there will be no certain limit short of the statute of limitations. In the ordinary course of business the accommodation paper is returned to the custody of him who pays it, which in the regular course of events should be the accommodatee. While in such case it is legally extinguished, it may continue in physical existence. There is no compulsion to destroy it, and it certainly is not uncommon for business men to retain upon their files paid and canceled negotiable paper as a convenient form of record. Thus it is possible at any time again to deliver such note to some third party, and, indeed, to repeat the operation indefinitely. We are satisfied that such is not the ordinary understanding in making accommodation paper, and that the safety of innocent holders does not require that such breaches of the terms of the accommodation should be held to re-arouse an extinguished liability against mere sureties. Our conclusion, therefore, upon this branch of the subject is that neither Herman nor his principal had authority from the document alone to sell or discount this note after it had once been discounted and paid at maturity by the primary debtor, of which transaction the plaintiff is conceded to have had actual notice in addition to that which might be imputed to him from the dishonor of the paper.

2. Justification of the action of the trial court is also attempted on the ground that, by the discount of the note for full value to Wight, he acquired a perfect title as against all parties, and that such title he might effectively transfer to an-

other, although that other were charged with notice of some defects in the title of some previous holder. This is undoubtedly the general rule, and if the sale by Herman to Wight had been an honest one on Herman's part, within his authority as agent, then Wight might have sold the note back to Herman in his individual capacity and he have acquired a good title thereby which again he might transfer to another. But if Herman sold the note fraudulently as a part of a general purpose to embezzle or appropriate to himself the proceeds thereof in fraud of the rights of his principal, a different rule must apply. In that case Herman became the primary debtor as between himself and his principal. It was then his duty to pay the debt represented by the note for which he had fraudulently received the consideration, and when he paid the money for the note to Wight the law will not permit him, or any one holding under him with notice, to assert that he paid it in purchase of an instrument which it was his duty to pay and discharge. No such unlawful construction of his act can be indulged where the same act is open to the entirely legitimate construction of mere performance of his duty to pay the note. *Andrews v. Robertson,* 111 Wis. 334, 336, 87 N. W. 190. This principle, which is so trite as hardly to warrant citation of authority, is recognized by the Negotiable Instrument Law (sec. 1676—28, Stats.: Supp. 1906), which provides:

"A holder who derives his title through a holder in due course, and who is not himself a party to any fraud, duress or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to such holder."

If Herman made the sale to Wight fraudulently he could not, under this statute, acquire the good title which Wight held only by virtue of being a holder of the instrument in due course. When it came back to his hands it reassumed the same position it formerly occupied, and he could dispose of it to another, not an innocent holder, only within the limits of his own rights and authority. The question whether Herman

acted fraudulently in negotiating the note to Wight was involved in conflict of evidence either received or offered and much uncertainty of inference from such evidence and should have been passed on by the jury; as also the question whether his payment to Wight was an attempted purchase by him individually or payment of the note on behalf of his principal.

There are doubtless other grounds on which plaintiff may be entitled to recover in whole or in part against all or some of the defendants, but we find all of them so involved in conflict of evidence or of inference of fact that they cannot support the direction of verdict upon the present trial. Thus, although Herman did not pay over to his principal the actual proceeds of the sale of the note to Wight, which perhaps would raise an inference of fraud, that inference might be rebutted if it appeared that his arrangement or previous dealings with the *Buckleys* showed an understanding that he should retain such proceeds as a general credit to them on account, to meet calls on him as they might be made subsequently, or to offset advances theretofore made; of which, indeed, some vague suggestion appears. In such case the sale to Wight might be legitimate; Herman not a party to any fraud, and therefore free to buy the perfect title which Wight held. Then would arise the question whether he did buy it or merely make payment as *Buckleys'* agent: affected again by the inference to be drawn from their dealings as to the scope of his agency contract and duty. Again, there was some evidence offered or received that Herman had advanced or bound himself to advance $500 on this note when placed in his hands. Doubtless if he parted with value on the faith of the note he would have right therein as security to that extent. Whatever rights Herman in law had were doubtless transferred to plaintiff, in absence of actual participation by the latter in some fraud. Sec. 1676—20, Stats. (Supp. 1906); sec. 2605, Stats. (1898); *Webber v. Quaw*, 46 Wis. 118, 49 N. W. 830.

By the Court.—Judgment reversed, and cause remanded for a new trial.

STACKS, Administratrix, Appellant, vs. BUTEN, interpleaded, etc., Respondent.

December 8, 1909—January 11, 1910.

Banks and banking: Assignment of bank book: Evidence: Validity: Notice to bank.

1. Evidence showing, among other things, that defendant had rendered services to plaintiff's intestate while she was sick and helpless, had advanced moneys to secure necessaries for her, had at her request attended to her affairs, and that he was in possession of her savings bank deposit book with a slip attached on which was written: "Ed, this is for you. Lida," and also of withdrawal receipts signed by her, is *held* to sustain a finding by the court that said slip was an assignment of the bank book to him by the intestate.
2. A written assignment of a savings bank deposit book may convey title as between the assignor and assignee though not brought to the notice of the bank as required by sec. 2319c (Supp. 1906; Laws of 1901, ch. 390, sec. 1); and death of the assignor does not cancel such an assignment or prevent the assignee from thereafter making it effective as to the bank by delivering it or a copy to the bank.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Plaintiff is the duly appointed executrix of Lida Webb, who died June 23, 1907. For some time prior to her death she was an invalid. She used crutches and required assistance about her home. The defendant *Buten* cared for her needs, with his own money purchased fuel, provisions, and medicines for her, and acted as her servant and nurse. On April 1, 1907, the deceased had to her credit in her name in the Second Ward Savings Bank of Milwaukee the sum of $249.34, evidenced by a passbook of the bank. About April 1, 1907, *Buten* came into possession of the bank book with six receipts signed by the deceased, and with a slip of paper pinned to the cover of the book on which was written: "*Ed,* this is for you. Lida." After April 1, 1907, and during the lifetime

of the deceased, the defendant *Buten* filled out four of the receipts for a total of $47.34, presented them at the bank, and received the money on them. After the death of the deceased he filled out one receipt for $50 and was paid the amount of the receipt upon its presentation at the bank. Some days after the appointment of the plaintiff as administratrix the defendant *Buten* notified the bank that the deceased had assigned, delivered, and set over unto him all her right, title, and interest to the deposit in the bank. The plaintiff, as administratrix of the estate of the deceased, brought action against the bank for the sum which was in the bank to the credit of the deceased at the time of her death. The bank petitioned that *Ed Buten* be interpleaded and made a party to the action. The court issued an order making *Buten* a party defendant, and the bank paid the amount shown by its books as due the deceased into court. The court found that the defendant *Buten* had rendered valuable services for the deceased, and that the placing of the bank book, the receipts, and the slip in the hands of the defendant *Buten* was an assignment, and that *Buten* was the lawful owner of the account and the money due thereon. This is an appeal from the judgment dismissing the complaint, ordering that the sum paid into court be recovered by *Buten,* and awarding *Buten* his costs against the plaintiff.

The cause was submitted for the appellant on the brief of *W. H. Timlin, Jr.,* and *Patrick W. Dean,* and for the respondent on that of *Samuel Wright* and *Lenicheck, Fairchild & Boesel.*

SIEBECKER, J. The trial court found that the decedent had assigned her right, interest, and title in and to the moneys and the claim she had as a depositor of the defendant bank to the defendant *Ed Buten* in consideration of services rendered and money loaned and advanced by *Buten* for the decedent at her request and with her consent. The point is

made that the evidence fails to show that any consideration passed from *Buten* to the decedent which will sustain this claim of an assignment to him of the claim evidenced by the bank book. The facts and circumstances before the court warrant the inference that *Buten* rendered services for the decedent while she was helpless from sickness; that he advanced money to secure necessaries for her; that at her request he attended to her affairs; and that the deposit book, with the slip attached, having thereon the words, "*Ed,* this is for you. Lida," was in his possession, as were also the withdrawal receipts signed by her. That *Buten* had possession of them before her death is sufficiently shown. The import of the writing attached to the book, in the light of the attending facts and circumstances, supports *Buten's* claim that it is an assignment to him of decedent's claim against the bank. The facts showing that he had rendered valuable services for her in times of distress and need, had advanced money to provide her with necessaries, and that he was given possession of the bank book are strong confirmatory evidential facts that the writing was intended to assign the account. We are persuaded that the court's findings on these branches of the case are not so clearly against the preponderance of the evidence as to warrant reversal of them.

It is contended that the alleged assignment is of no validity under sec. 2319*c,* Stats. (Supp. 1906; Laws of 1901, ch. 390, sec. 1), which enacts that:

"No gift, sale, assignment or transfer of any saving fund bank book bearing evidence of bank deposits or of any interest in the deposits represented thereby, shall be valid unless the same be in writing and the same or a copy thereof delivered to the bank issuing such bank deposit book."

The alleged assignment was not delivered to the bank until after the death of Lida Webb, the owner. The defendant *Buten* delivered the alleged written assignment to the bank on August 13th, after the death of Lida Webb on June 23, 1907.

The provisions of the law indicate that it was designed to protect banks as to payments made on such accounts before they have had notice of an assignment. The notice to the bank is given by serving on the bank the written assignment or a copy thereof. The execution and delivery of the written assignment by the assignor to the assignee executes the transfer as between them and operates to convey title to the claim from the assignor to the assignee. By the terms of the statute such transfer of the title to the claim is, however, not operative and binding on the bank until it is brought to its notice in the manner specified in the statute. We are of the opinion that the statute was not intended to provide that the assignor's death should cancel the assignment thus completed between the assignor and assignee. The more reasonable interpretation is that under such circumstances the assignment is to remain effective between the parties thereto and is to become operative on the bank when it is brought to its attention by the service of the written assignment or a copy thereof upon it. Under the statute, then, *Buten* became the owner of the claim when the written assignment was delivered to him, and it became binding on the bank at the time it was notified thereof as provided by the statute. We perceive no legal obstacle to holding that the assignment was valid between the decedent and *Buten* after decedent's death, and that it was effective as to the bank from the time it was brought to the bank's notice.

We regard the judgment of the trial court awarding *Buten* the relief asked for in his counterclaim as correct.

By the Court.—The judgment of the trial court is affirmed.

TIMLIN, J., took no part.

DE WOLF, Appellant, vs. WISCONSIN LAKES ICE & CARTAGE COMPANY, Respondent.

December 8, 1909—January 11, 1910.

Brokers: Commissions on sale of land: Contract construed.

1. By a contract reciting that plaintiff, a broker, had undertaken to procure a lessee or purchaser for certain land, defendant, the owner, agreed that if a certain lease should be executed plaintiff should receive a certain commission, and if thereafter during the term the lessee, its successors or assigns, should purchase the land, plaintiff should, "upon the execution and delivery by" defendant "of a deed to said real estate" to the lessee, its successors or assigns, receive a certain sum as a further and additional commission. The lease was executed, and gave to the lessee, its successors or assigns, an option to purchase. A successor to the rights of the lessee purchased pursuant to such option, and received a deed from a mesne grantee of the defendant who had purchased the land subject to the lease and option. *Held*, that plaintiff thereupon became entitled to the additional commission from defendant, it being immaterial whether the deed was executed directly by defendant to such purchaser or through mesne conveyances.
2. Defendant could not escape liability for such additional commission by transferring the land to another, or by any failure on its part to execute and deliver the deed to the purchaser under the option given in the lease.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This action was brought to recover commission on sale of real estate based upon the following contract:

"Whereas, *John E. De Wolf* has undertaken to procure a lessee or purchaser for the *Wisconsin Lakes Ice & Cartage Company,* of the real estate in the city and county of Milwaukee, Wisconsin, known and described as lot nine (9), in section sixteen (16), town seven (7) north, of range twenty-two (22) east, in the Eighteenth ward, west of the right of way of the Chicago & Northwestern Railroad Company:

"Now, therefore, it is agreed by and between the *Wisconsin Lakes Ice & Cartage Company* and said *John E. De Wolf*

that if the lease of said real estate, concerning which negotiations are now pending, is executed by the *Wisconsin Lakes Ice & Cartage Company* to the Christianson Engineering Company, as lessee, and accepted by said lessee, *John E. De Wolf* shall receive, upon the execution and acceptance of said lease, the sum of six hundred dollars ($600) commission; and if, after the execution and acceptance of said lease at any time during the term thereof the Christianson Engineering Company, its successors or assigns, should become the purchaser of said real estate, the said *John E. De Wolf* shall, upon the execution and delivery by the *Wisconsin Lakes Ice & Cartage Company* of a deed of said real estate to the Christianson Engineering Company, its successors or assigns, receive as a further and additional commission the sum of six hundred dollars ($600).

"In witness whereof the said parties have hereunto caused their names signed this 7th day of October, A. D. 1899.

"WISCONSIN LAKES ICE & CARTAGE COMPANY,
"By J. H. Kopmeier, Secretary.
"JOHN E. DE WOLF.

"Signed in presence of Nathan Glicksman."

The complaint sets out the contract, and alleges that plaintiff was a dealer in real estate and doing a general real estate business in the city of Milwaukee, Wisconsin; that the contract above set out was entered into between the parties; that pursuant to the contract a lease was executed by the *Wisconsin Lakes Ice & Cartage Company,* defendant, to the said Christianson Engineering Company for a term of ten years, by virtue of which lease the defendant granted to the Christianson Engineering Company, its successors and assigns, an option to purchase the premises in question; that the Christianson Engineering Company went into possession under the lease, erected large buildings thereon, and made permanent improvements of the value of upwards of $150,000, and by itself, its successors and assigns, has continued in possession of said premises; that the defendant by warranty deed conveyed the premises to one Adolph Kellner, subject to the lease and option to purchase the premises and the various provisions

and conditions in the lease, and reserving to itself, in case the lessee should exercise the option to purchase, the right to cut ice for the term of twenty years from October 2, 1899; that Kellner and wife by warranty deed dated July 5, 1901, conveyed the premises for value to Jacob Nunnemacher, subject to the lease and reservations and the option to purchase the premises; that on December 3, 1902, the Christianson Engineering Company granted to the Chicago & Northwestern Railway Company an easement in the premises, and on the same date Nunnemacher granted an easement to said railway company; that on May 16, 1902, the Christianson Engineering Company conveyed to the National Electric Company all its right, title, and interest in the premises; that the National Electric Company was adjudged a bankrupt on the 8th day of June, 1905, and that John I. Beggs was appointed trustee on the 14th day of July, 1905, and qualified as such and went into possession of the property in question; that said Beggs as trustee exercised the option granted by the defendant to the Christianson Engineering Company, its successors and assigns; that Nunnemacher and wife conveyed to Beggs as trustee by warranty deed March 27, 1906, the premises, subject to the easements reserved by the defendant; that the defendant at the time of the execution of the lease referred to paid to the plaintiff, pursuant to the contract hereinbefore set forth, the sum of $600. The complaint further alleges due performance of the conditions of the contract on the part of the plaintiff and the exercise of the option to purchase by John I. Beggs as trustee, and a conveyance of the premises during the term of said lease and option, by reason whereof the defendant became indebted to the plaintiff in the sum of $600, which has not been paid although demanded.

The defendant demurred to the complaint for want of facts sufficient to constitute a cause of action, which demurrer was sustained, and from the order sustaining the demurrer this appeal was taken.

Adolph Huebschmann, for the appellant.

For the respondent there was a brief by *Henry J. Killilea* and *Rodger M. Trump,* and oral argument by *Mr. Killilea.*

KERWIN, J. The case turns upon the proper construction of the contract between plaintiff and defendant set up in the statement of facts. By this contract the plaintiff was to be paid $600 upon execution of a lease about which negotiations were pending at the time the contract was made. This lease was executed by the defendant to the Christianson Engineering Company as lessee and the $600 paid. The lease was for the term of ten years, and contained an option to the Christianson Engineering Company, its successors and assigns, to purchase. Under the lease and option the Christianson Engineering Company went into possession and made permanent improvements upon the property to the value of upwards of $150,000. The contract further provided:

"And if, after the execution and acceptance of said lease at any time during the term thereof the Christianson Engineering Company, its successors or assigns, should become the purchaser of said real estate, the said *John E. De Wolf* shall, upon the execution and delivery by the *Wisconsin Lakes Ice & Cartage Company* of a deed of said real estate to the Christianson Engineering Company, its successors or assigns, receive as a further and additional commission the sum of six hundred dollars ($600)."

We think it clear from the contract that the intention of the parties was that $600 should be paid when the lease was executed and accepted by the lessee, and that plaintiff was to receive $600 additional when the Christianson Engineering Company, its successors or assigns, should become the purchaser. When the contract to purchase was made the plaintiff became entitled to the additional $600, the language of the contract, "upon the execution and delivery," etc., having reference to the time of payment of the $600. The plaintiff had performed his part of the contract when he procured the pur-

chaser. It then became the duty of the defendant to make the proper transfer. And whether the transfer was made direct from defendant to the purchaser, or through mesne conveyances from the defendant, was wholly immaterial. The defendant was bound under the lease and option to make the transfer at any time during the life of the lease and option, and the purchasers from the defendant took the property subject to the lease and option. The conveyance from Nunnemacher and wife to the successors and assigns of the Christianson Engineering Company was a transfer of the property in pursuance of the contract with the plaintiff, and the plaintiff became entitled to the additional $600. The defendant could not escape liability for the payment of commission by transferring the property to another or by putting it out of its power to perform its part of the contract. *Cook v. McCabe,* 53 Wis. 250, 10 N. W. 507; *Comstock v. Fraternal Acc. Asso.* 116 Wis. 382, 93 N. W. 22; *Magill v. Stoddard,* 70 Wis. 75, 35 N. W. 346; *Riemer v. Rice,* 88 Wis. 16, 59 N. W. 450; *C. Aultman & Co. v. Ritter,* 81 Wis. 395, 51 N. W. 569; *Barthell v. Peter,* 88 Wis. 316, 60 N. W. 429; *Brink v. Mitchell,* 135 Wis. 416, 116 N. W. 16.

The contention of respondent is that under the terms of the contract the commission was not earned until a deed from the defendant was executed and delivered to the Christianson Engineering Company, its successors and assigns. The construction contended for by respondent is more technical than substantial and cannot be regarded as the construction intended by the parties. It cannot be held that the plaintiff was responsible for failure of performance on the part of respondent. When the plaintiff procured the purchaser it was the duty of respondent to perform its part of the contract by the execution and delivery of the deed.

Stress is placed upon the fact that while the contract provides for purchase by the Christianson Engineering Company, its successors and assigns, there is no provision for execution

and delivery of deed by the successors and assigns of defendant. The argument is ingenious but unsound. The purchase by the Christianson Engineering Company, its successors or assigns, under the lease and option entitled it to a deed from the defendant, and the defendant could not avoid the performance of its contract so as to defeat payment of commission by placing the title to the property in its successors or assigns any more than it could avoid performance by refusing or failing to make the deed had it not parted with the title. It follows, therefore, that upon the facts stated in the complaint and admitted by the demurrer the complaint states a cause of action and the demurrer should have been overruled.

By the Court.—The order sustaining the demurrer is reversed, and the cause remanded with directions to overrule the demurrer.

WINKLER, Respondent, vs. POWER & MINING MACHINERY COMPANY, Appellant.

December 8, 1909—January 11, 1910.

Master and servant: Injury from defective appliance: Evidence: Contradiction of physical laws: Questions for jury: Appeal: Presumptions in support of verdict: Negligence of master: Common usage: Special verdict: Separate question as to assumption of risk: Request: Opinions.

1. The proposition that testimony as to the manner in which an injury was inflicted is in contradiction of known physical laws and therefore impossible and incredible must be supported by demonstration, not by mere conflict of evidence; and all the necessary data for demonstration must appear affirmatively and not depend upon mere credibility of other witnesses.
2. In an action for personal injuries caused by the spilling of molten iron from a crane ladle in defendant's foundry, the evidence is *held* not to furnish data sufficient to demonstrate that the injury could not possibly have happened in the manner testified to on the part of plaintiff; and the question whether it did so happen was one for the jury.

3. If necessary to support the verdict, it will be presumed on appeal that the jury were satisfied of the existence of a fact properly before them for determination.
4. In an action for personal injuries to an employee caused by the spilling of molten iron from a crane ladle in defendant's foundry, the fact that the ladle was in substantially as safe condition as similar ladles used in such foundries generally is competent and proper to be considered upon the question of whether defendant exercised ordinary care in furnishing such appliance for use by its employees, but is not conclusive upon that question, as the appliance, though in common use, might be inherently, and to the employer obviously, dangerous.
5. The master cannot escape liability for injuries caused by his failure to exercise ordinary care to furnish his servants reasonably safe appliances by proving that all other masters in the same line of business and using the same appliances are equally negligent.
6. Although the question of plaintiff's assumption of the risk should properly have been submitted for special verdict separate from the question of his contributory negligence, a failure so to submit it cannot be assigned as error by defendant, where he did not present a question properly covering the matter and the verdict as found did in legal effect cover it.
7. A question which the court was asked to submit for special verdict, "Was the spilling of molten iron which caused plaintiff's injuries a common occurrence in the business of molding and one incident to plaintiff's work as a bench molder in defendant's foundry?" did not properly cover the question of plaintiff's assumption of the risk, since it did not embrace the question whether plaintiff knew, or in the exercise of ordinary care ought to have known, of such occurrences.
8. The opinion of a witness as to the extent to which certain gearing was worn two years before the time in question should have been excluded in the absence of data upon which to base it, there being no uniformity of progress in such wearing.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.* They cited, among other cases, *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456; *Hamann v. Milwaukee B. Co.* 127 Wis. 550, 106 N. W. 1081; *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554;

Dugal v. Chippewa Falls, 101 Wis. 533, 77 N. W. 878; *Lounsbury v. Davis,* 124 Wis. 432, 102 N. W. 941; *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633; *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Schmitt v. Hamilton Mfg. Co.* 135 Wis. 117, 115 N. W. 353.

For the respondent there was a brief by *Rubin & Zabel,* and oral argument by *W. B. Rubin.* Among other authorities, they cited *Ryan v. Oshkosh G. L. Co.* 138 Wis. 466, 120 N. W. 264; *Twentieth Cent. Co. v. Quilling,* 136 Wis. 481, 117 N. W. 1007; *Estey Organ Co. v. Lehman,* 132 Wis. 144, 111 N. W. 1097; *Finkelston v. C., M. & St. P. R. Co.* 94 Wis. 270, 68 N. W. 1005; *Duncan v. Grand Rapids,* 121 Wis. 626, 99 N. W. 317; *Davey v. Janesville,* 111 Wis. 628, 87 N. W. 813; *Fleming v. Northern T. P. M.* 135 Wis. 157, 114 N. W. 841; *Grant v. Keystone L. Co.* 119 Wis. 229, 96 N. W. 535; *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48; *Castello v. Landwehr,* 28 Wis. 522; *Stucke v. M. & M. R. Co.* 9 Wis. 202; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Blankavag v. Badger B. & L. Co.* 136 Wis. 380, 117 N. W. 852; *Patnode v. Westenhaver,* 114 Wis. 460, 90 N. W. 467; *Hocking v. Windsor S. Co.* 125 Wis. 575, 104 N. W. 705; *Van de Bogart v. Marinette & M. P. Co.* 127 Wis. 104, 106 N. W. 805; *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671.

TIMLIN, J. The plaintiff in this case had a verdict which may be abbreviated as finding: (1) That he was burned by molten iron falling from a crane ladle in defendant's foundry on May 15, 1907. (2) The apparatus controlling the movement of the crane ladle containing this molten iron was so worn and loose as not to be reasonably safe, etc. (3) This unsafe condition of said apparatus was the proximate cause of the injury to plaintiff. (4) The defendant knew of such unsafety in time to have prevented the injury by the exercise of ordinary care. (5) The defendant also ought to have known,

etc. (6) The plaintiff did not know prior to the injury that said apparatus was not reasonably safe; (7) nor ought he to have so known in the exercise of ordinary care. (8) No want of ordinary care on the part of Frank Miller, a co-employee, caused the injury. (9) No want of ordinary care on the part of the plaintiff. (10) Plaintiff's damages, $2,000.

The appellant's counsel assigns numerous errors in the proceedings below, making his principal argument, however, on the proposition that the testimony on the part of the plaintiff relating to the manner in which his injury was inflicted is in contradiction of known physical laws and therefore impossible and incredible. This proposition must be supported by demonstration, not by mere conflict of evidence, and in order to present it properly all the necessary data for demonstration must appear affirmatively and not depend upon mere credibility of other witnesses. *Rasmussen v. Wis. T., L., H. & P. Co.* 133 Wis. 205, 113 N. W. 453. The evidence in this case is very deficient in measurements and descriptions, but, supplying defects in the testimony from an exhibit purporting to be drawn to a uniform scale and weighing the facts thus ascertained for the purpose of testing this question, we have the following:

The crane ladle in question was a somewhat circular iron bucket lined with fire brick and forty-three inches in height, having an inside diameter at a point three inches below the top of thirty-nine inches, an inside diameter at the bottom of thirty-five inches, and an inside diameter near the center at the point of suspension of thirty-seven inches. It was suspended on a movable crane by means of a chain hook engaging at the apex of an arched handle somewhat similar to that of an ordinary pail or bucket. This handle arched over the top and extended on the outside down the sides of the ladle or bucket, and connected with the latter by means of two journals protruding from the ladle and carried at exactly opposite points in its circumference. Each of these journals fitted

into journal boxes or sockets in the lower ends of this handle. The center line of suspension of this ladle or bucket in the lower extremities of said handle by means of said journals was twenty-one inches above the bottom of the ladle and twenty-two inches below the extreme top thereof. On the occasion in question the ladle was filled to within three or four inches of the top with melted iron. The ladle has a capacity of five tons of this melted iron, as we understand the evidence. Whether this was three or four inches below the top would be of paramount importance in any attempt at demonstration. We have no evidence showing, when the ladle is empty, the relative mass above and below the line of suspension. The diameter of the ladle increases toward the top, and there is one inch more in height of the ladle above the line of suspension, but there is the closed heavy lined bottom as against the open top. The top carries a lip or spout over which the metal pours, but the protrusion or projection or the dimensions of this lip or spout are not given. The lining of fire brick or fire clay which covers the inside of the bottom and sides thins off in a curve at the top and the measurements of this curve are not given. This lip and curve materially affect the tilting of the ladle by bringing the molten material farther off from the line of suspension as this heavy bottom affects it in a contrary direction by rising to and remaining at a distance from the line of suspension, while the liquid contents seek their level and flow away from the bottom. But from data collected from the drawings it is apparent that, assuming the ladle to be exactly circular and of the varying diameter stated, the cubic contents of the ladle, when filled to within three inches of the top, would be 23,604 inches above and 19,330 inches below the line of suspension. This would leave about fifty-five per cent. of the whole contents above the line of suspension. Without knowing what mass of the ladle itself was above and what below this line, the last figures are not available for purposes of demonstration.

One of the journals on which this ladle was swung extended through its socket or journal box in the lower extremity of the handle several inches. Upon this projection there was attached rigidly a cogwheel of about twenty inches diameter equipped on its periphery with worm cogs convex on their outer edge. On top of this twenty-inch wheel and tangent to its circumference and engaging with its cogs was a straight short bar carrying a spiral projection, which for convenience we will call the "screw." This screw was journaled at each end in journal boxes or sockets rigid upon the outside of the handle. On one end of this screw was a miter gear, and on a short shaft running at right angles with this screw and engaging with it at this end there was also a miter gear, and on the other or outside end of this short shaft was a hand wheel of about two feet in diameter. For the purpose of pouring out the molten contents of the ladle, the operator, by turning this hand wheel, imparted through the miter gearing a slow rotary motion to the screw. This last more slowly moved the rigid twenty-inch wheel, this tipping the ladle in the required direction and also holding it back from tipping over too rapidly. The spiral projection, or in other words the thread of the screw, did not fit closely between the cogs of the twenty-inch wheel, so that when the operator at the two-foot wheel began the operation of pouring out the melted iron, the ladle being then perpendicular or it might be slightly inclined in the opposite direction, he must first, by putting the screw in motion, bring the thread hard against that side of the cogs of the twenty-inch wheel opposite to the direction in which he intended to pour. This pressure would continue on that side of the cogs until the ladle had been so far tilted that the center of gravity of the ladle and its contents would fall on that side of the line of suspension toward which the pouring took place. At this point the ladle and its contents would take what the witnesses call a drop. That is, it would lurch in the said direction, changing the pressure of the screw thread against the

cogs of the twenty-inch wheel to the other side of such cogs, and holding back instead of pushing on these cogs. This would continue until so much of the contents had been poured out that the relative quantity remaining in the bottom of the ladle with the heavy bottom would again shift the center of gravity to the other side of the line of suspension, when the ladle would take a similar lurch but in the opposite direction from the first, and the operator would be again engaged as he began.

The defendant's witnesses agree with those of the plaintiff with respect to the existence of these two lurches, but plaintiff's witnesses say there were other intervening lurches, while this last is said to be impossible. Whether or not this is possible is not necessary to the determination of this case. It depends, however, upon many factors not shown by the evidence, principal among which is the rate at which the ladle is emptied and the continuity of the motion of tilting in one direction and the volume of bucket and contents above and that below the line of suspension and the oscillations of the swinging ladle. The extent of this lurch or drop is a matter upon which the evidence is widely divergent. There is competent evidence from both sides that the space between cogs on the twenty-inch wheel minus the thickness of the screw thread or spiral projection amounted to one eighth of an inch. The distance from the center of suspension to this contact as shown by the drawings is ten inches. The distance from the same center to the top of the bucket and ladle along the same line from the same data is twenty-two inches. Regarding the center of suspension as the center of a circle and the top of the ladle in its circumference, the mathematical formula would be: cos. : sin.=r. : tan.; or 10 : .125=22 : .275. From this cause alone the movement at the top of the ladle would be only slightly in excess of one fourth of an inch in a straight line. There is, however, in the record some testimony from the witness Gaertner in which he states that the distance from

the point of contact between the screw and the twenty-inch wheel to the trunion of the ladle is only nine and one-half inches and the distance from this trunion to the lip or spout of the ladle or bucket presumably along the same line is 33 inches. From this he gets the proportion $9\frac{1}{2} : \frac{1}{8} = 33 : 7\text{-}16$. But his basic figures conflict with the dimensions shown on the exhibit, and his proportion is not mathematically accurate. This witness further testifies that although there was only one eighth of an inch play between the cogs on the twenty-inch wheel and the spiral projection on the screw, yet, on account of some looseness in the journals, the whole movement at this point which he found was really one fourth of an inch. Here we find an omission in the evidence which forbids any accuracy approaching demonstration. There is no evidence from which we can ascertain the lateral movement of the screw in its journal boxes. Nothing to show what collars or shoulders it had, how near they were to the journal boxes on each side of the latter, and nothing to show the amount of play or looseness of the suspensory journals in the lower extremities of the handle. Consequently when an eyewitness states that the ladle lurched or dropped several inches, while we may suspect exaggeration, we cannot demonstrate his incorrectness. The total of looseness or play estimated by Gaertner would make the lurch at the top of the ladle, according to the scale of the exhibit, $10 : .25 = 22 : .55$, and according to Gaertner's data, $9.5 : .25 = 33 : .86$ plus. In either case there would be a considerable jar from a mass of five tons suspended as described falling this distance and then suddenly arrested. It must also be considered that this lurch or movement is in a circle around the line of suspension, passing through the lower extremities of the ladle handle. The top of the ladle lurches in the direction in which the iron is being poured, while the bottom of the ladle lurches back in the opposite direction. The impact is against the handle at the point where the journals of the screw are rigid thereon, and this handle is loose

at the chain hook above the point of impact and at the line of suspension below the point of impact. There must therefore be at times a lurch of this swinging bucket much greater than the measurements above given. This would necessarily produce a wave and probably more than one wave of some height in the liquid iron moving in the direction in which the iron was being poured, and suddenly increasing the volume falling over the lip or spout of the ladle. Some of the witnesses describe this lurch or drop as much greater than above indicated. We are unable to oppose mathematical verities or kinetic laws to the testimony of Gaertner or to that of the other witnesses, because we are left without any certain or reliable data upon which to base our computations. But it is argued that this lurch in the direction in which the iron was being poured could not have occurred more than once in the operation of pouring and that at or near the time when the pouring began. We find no sufficient data upon which counsel can affirm this as a mathematical verity, although it seems quite probable. But, as said, this presents an immaterial issue. Although the plaintiff testified in examination before trial that the lurch and consequent spilling over of iron which caused his injury occurred after a considerable quantity of the contents of the ladle had been poured out, his testimony in chief at the trial, as well as that of the witnesses Kaiser, Brember, and Schumacher, tends to show that the lurch, spill over, and injury to the plaintiff occurred immediately after the operator began to pour. This was a question for the jury, and if they were satisfied that the accident occurred at this stage of pouring, as we must presume they were if that is necessary to uphold their verdict, all conclusions based upon other premises vanish. We are satisfied there was in the particulars covered a fair question for the jury. It is suggested that common sense is sufficient to show the incredibility or impossibility of plaintiff's testimony. What is thought to be common sense is frequently nothing more than a fixed belief based on no evidence

and supported by no reasons, and it then ordinarily lacks the certainty requisite for the annihilation of positive evidence to the contrary.

The defendant asked the court to instruct the jury as follows:

"If you find that in furnishing the crane ladle in use at the time plaintiff was injured defendant exercised ordinary care to see that such ladle was in a reasonably safe condition—that is to say, in substantially as safe condition as similar ladles were, which were used in such foundries generally,—then the defendant discharged its duty toward the plaintiff, and your answer to the second question will be 'No.'"

This instruction is too absolute, and if given would take away from the jury their right to reject the test of common usage on the ground that such appliance in common use was itself inherently, and to the master obviously, dangerous. *Yazdzewski v. Barker,* 131 Wis. 494, 111 N. W. 689.

There is no rule of law which will enable a master to escape the consequences of failing to exercise ordinary care to furnish his servants reasonably safe appliances by proving that all other masters in the same line of business and using the same appliances are equally negligent. The evidence referred to in this requested instruction was competent and proper to be considered by the jury as bearing upon the question of whether or not the master exercised ordinary care in this respect; but to make such evidence conclusive on the jury by an instruction like that requested here would be to bind them to find that the other foundrymen were men of ordinary care and prudence in this respect. This might or might not be true. It was for the jury to say which. There is considerable testimony tending to show that the device in question is inherently and obviously defective for the purpose for which it is used when it becomes worn to such an extent as to cause or aggravate the lurch and splash described.

On the question of assumption of risk by the plaintiff the

case is quite close. There is, however, some evidence on the part of the plaintiff that he did not know of such lurch of the bucket or ladle or of the looseness of the pouring device and had no information concerning these matters; that prior to the day of his injury he had never caught in his hand ladle melted iron from the five-ton ladle; and the jury found his lack of knowledge in this regard by the sixth and seventh questions of the special verdict. The appellant contends that this was a case in which the question of the contributory negligence of the plaintiff and that of his assumption of the risk should have been separately submitted, as indicated in *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633. We believe this view is correct. The appellant, however, did not properly request the submission of such question to the jury. He asked the court to submit:

"Was the spilling of melted iron which caused plaintiff's injuries a common occurrence in the business of molding, and one incident to plaintiff's work as a bench molder in defendant's foundry?"

If we eliminate the words "which caused plaintiff's injuries" or treat them as equivalent to "such as caused plaintiff's injuries," still the question would cover only one of the elements of assumption of risk, viz., that of the ordinary and usual nature of the occurrence, and would leave the case without finding whether the plaintiff knew or ought in the exercise of ordinary care to have known of such occurrences. The special verdict, on the other hand, did negative knowledge of this danger, actual or imputable, on the part of the plaintiff, thus in legal effect negativing assumption of risk. If the appellant seeks in such case to assign error for refusal to submit a question to the jury, he must first present a proper question fully covering the matter which he wishes to have submitted.

We do not think there was error in permitting the examination of Niedermeyer as an adverse witness nor in the admission of evidence, unless it be in the opinions of the witness Gaertner with respect to how much the gearing was worn two

years before. This last should have been excluded because the witness had no data upon which to base such an opinion. There is no uniformity of progress in such things. But the evidence was not prejudicial in view of the fact that it was contended on the part of the defendant that such gearings are always loose and necessarily loose, and that this burning of workmen with melted iron and this dip or lurch of the ladle is a common occurrence. But we are not convinced from the evidence that such gearings are always loose or necessarily loose to the extent that a lurch and a splash dangerous to workmen is usual or inevitable. If such condition, indeed, prevail, a little ingenuity on the part of foundrymen will make these appliances safe, take them out of the category of inherently dangerous devices in which the evidence in this case tends to place them, advance humane principles, and save the payment of damages to the injured.

The instructions of the court below to the jury seem to us very fair and impartial and sufficiently present the defendant's side of this case to the jury. Other errors are assigned, but it is unnecessary to notice them in detail. We are convinced that substantial justice has been done and no error prejudicial to the appellant has been found.

By the Court.—Judgment affirmed.

DELLER, Respondent, vs. DELLER and another, Executors, Appellants.

SAME, Appellant, vs. SAME, Respondents.

December 9, 1909—January 11, 1910.

Husband and wife: Antenuptial agreements: Validity: Construction: Adequacy of provisions for wife: Waiver of allowances.

1. An antenuptial agreement whereby the future wife releases her right of dower and other rights in the estate of the husband upon his death, will be regarded with the most rigid scrutiny and will not be upheld unless free from fraud or imposition.

2. Assuming that an antenuptial agreement may be held invalid because of the mere insufficiency of the provision made for the intended wife, a contract providing that she should receive $5,000 in lieu of all rights given to a widow cannot be held invalid upon that ground, although the husband's estate amounted to $85,000.
3. In construing an antenuptial agreement the general rule applies, that the intention of the parties is controlling; but, so far as the contract is ambiguous and the intention doubtful, that construction which is most favorable to the widow should be adopted if consonant with reason and if no violence is thereby done to the language used.
4. An antenuptial agreement, otherwise valid, which precludes the widow from claiming the allowances provided for by sec. 3935, Stats. (1898), is enforceable.
5. An antenuptial agreement under which the future wife was to receive a certain sum in lieu of her dower right and in lieu of "all right, title, and interest which she would have by law" in the husband's estate, and she agreed that such pecuniary provision so made for her should be in full satisfaction of her dower and that she would not "claim any share" in the personal estate of the husband, precluded her from claiming any allowances under subd. 1, 2, sec. 3935, Stats. (1898).
6. An antenuptial agreement providing that the prospective husband should, "during his natural life and the life of the" intended wife, provide for her all the necessaries of life, and that in case of his death before hers she should have from his estate a certain sum in lieu of her dower right and in lieu of all right, title, and interest which she would have by law in his estate, is construed as giving her at his death, in addition to the specific sum named, the right to a reasonable provision for her support during her natural life.

APPEALS from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed on defendants' appeal.*

The deceased, Joseph Deller, was married on May 23, 1895, to the petitioner herein. At that time he was a widower aged sixty-six and she was a spinster aged forty-one. The deceased had several children by his former wife, who were living at the time of his marriage in 1895 and are still living. No issue was born of the marriage which took place at that time. On April 5, 1895, the following antenuptial

agreement was executed and acknowledged between the parties:

"This agreement, made and entered into this 5th day of April, A. D. 1895, by and between Joseph Deller, party of the first part, and *Miss Eva Baer,* party of the second part, witnesseth, that whereas a marriage is about to be solemnized between the parties hereto, and the said Joseph Deller is desirous of making provision for a fit and proper settlement to the use of the said *Miss Eva Baer,* his intended wife, now, therefore, the said Joseph Deller, party of the first part, does hereby agree, if the said marriage be solemnized as aforesaid, that during his natural life, and the life of the said *Miss Eva Baer,* his intended wife, he will in sickness and in health provide for her all the necessaries of life, and such luxuries as may be suitable and proper considering their circumstances, and in all things be a good and faithful husband so long as they both shall live; and the said Joseph Deller does further covenant and agree, in case said marriage be solemnized as aforesaid, that in case of his death prior to the death of his said wife that she, the said *Eva Baer,* shall have out of the estate of the said Joseph Deller the sum of ($5,000) five thousand dollars, lawful money of the United States, to be by her received for her sole and separate use and benefit and at her death to be disposed of by her as she may see fit, the same to be in lieu of her dower right in the estate of the said Joseph Deller, and in lieu of all right, title, and interest which she would have by law in the said estate. And the said *Miss Eva Baer,* in consideration of the premises, does for herself, her heirs, executors, and administrators covenant and agree with the said Joseph Deller, her intended husband, that the pecuniary provision hereinbefore made for her shall be in full satisfaction of her dower in the estate of the said Joseph Deller and shall bar her from claiming the same if she shall survive him after said marriage, and further, if the said marriage shall occur as aforesaid and she shall survive him, that she shall not claim any share in his personal estate, unless some part thereof is given her by his last will or some act done subsequent to the execution of these premises. And it is further agreed by and between the parties hereto, that their respective property possessed at the time of the said marriage, or which

either of them shall thereafter acquire, shall remain the separate property of each and may be by them conveyed or transferred in the same manner as if they were single and unmarried. And the said *Miss Eva Baer* does accept the foregoing provisions on her part, in case the said marriage shall be solemnized as aforesaid, and does agree to comfort the said Joseph Deller in sickness and in health, and ever to be a prudent and faithful wife, during their lives."

Thereafter the following postnuptial agreement was executed and acknowledged:

"Whereas, a certain marriage settlement bearing date the 5th day of April, A. D. 1895, was made and executed by and between Joseph Deller of the city of Mineral Point, in Iowa county, Wisconsin, and *Miss Eva Baer* (now *Mrs. Eva Deller*), formerly of the city of Milwaukee, Wisconsin, which said marriage settlement is hereto attached; and whereas, said parties are informed and believe that said marriage settlement does not express with sufficient clearness the intention in the minds of the parties thereto at the time of the execution of said marriage settlement: Now, therefore, it is hereby mutually understood and expressly declared by and between the parties to said marriage settlement that it was the intention of both parties at the time of the execution thereof that said Joseph Deller was to provide for his said wife in sickness and in health all the necessaries of life and such luxuries as may be suitable and proper considering their circumstances, for and during the period of his natural life, and that such provision should not continue beyond the life of said Joseph Deller, but that at his death his said wife was to receive five thousand dollars ($5,000) out of his estate and that she should have no other or further claim upon his estate. In witness whereof the said parties have hereunto set their hands and seals this 7th day of October, A. D. 1895."

Joseph Deller died in June, 1907, leaving an estate of about $85,000, all of which was disposed of by will. After the will had been admitted to probate the widow filed a petition praying for an allowance of the articles of personal property specified in subd. 1, sec. 3935, Stats. (1898), and praying for a proper allowance for her support during the administration

of the estate, under subd. 2 of said section. The executors contested such allowances on the ground that the antenuptial agreement barred the petitioner's right to them. On September 25, 1907, the county court made an order granting the prayer of the petition, from which order an appeal was taken to the circuit court for Milwaukee county. Thereafter and on December 31, 1907, the widow filed in the county court a renunciation of certain provisions made for her in the decedent's will. On January 22, 1908, the executors paid to the widow the $5,000 stipulated for in the antenuptial agreement; it being stipulated at the time that the acceptance of such sum should not be construed as a waiver of the widow's right to claim interest thereon or to claim the statutory allowances for which she had petitioned. On the trial on the appeal the circuit court held that the widow was entitled to the allowances provided for by subd. 1, 2, sec. 3935, Stats. (1898). The court, however, reduced the allowance of $100 per month, made by the county court to the widow for support during the pendency of the administration proceedings, to $60 per month.

The petitioner appeals from this portion of the judgment of the circuit court, and the executors appeal from the judgment on the ground that no allowance whatever should have been made. The circuit court further found as matters of fact and as conclusions of law that the postnuptial contract was invalid and that the antenuptial contract was not affected thereby; and further, that the antenuptial contract on its face contained an agreement to provide for the support and maintenance of the petitioner during her natural life, in addition to paying the sum of $5,000 as provided in said agreement.

For the plaintiff there were briefs by *Scheiber & Orth,* and oral argument by *Fred Scheiber.*

For the defendants there was a brief by *Quarles, Spence & Quarles,* attorneys, and *George Lines,* of counsel, and oral argument by *Mr. Lines.*

BARNES, J. The authorities, aside from those of Alabama, are quite unanimous in holding that a valid antenuptial agreement may be made, and this court so decided in *West v. Walker,* 77 Wis. 557, 46 N. W. 819. Usually in such contracts the woman, in consideration of a specific allowance in money or property, or both, on the death of her husband, surrenders the provisions which the law makes for her in the event of the intestacy of the husband or of her election to renounce the provision made for her by will. An agreement whereby the future wife releases her claim to her right of dower and other rights in the estate of her husband upon his demise must be free from fraud or imposition, and it will be regarded with the most rigid scrutiny, and will not be approved where it appears that the future wife has been overreached or deceived or has been induced by false representations to make the contract. *Pierce v. Pierce,* 71 N. Y. 154; *Warner v. Warner,* 18 Abb. N. C. 151; *Kline's Estate,* 64 Pa. St. 122; *Kline v. Kline,* 57 Pa. St. 120; *Tarbell v. Tarbell,* 10 Allen, 278; *In re Devoe's Estate,* 113 Iowa, 4, 84 N. W. 923; *Mintier v. Mintier,* 28 Ohio St. 307; 21 Cyc. 1249, and cases cited.

In *Kline v. Kline, supra,* it is said:

"The relation of parties betrothed to each other is one of unbounded confidence, especially on the part of the woman. They are not in the same category with buyers and sellers, and are not dealing at arm's length."

Language of similar import is used by the New York court of appeals in *Graham v. Graham,* 143 N. Y. 573, 580, 38 N. E. 722, 724, where it is said:

"The relations between the intended wife and her future husband are regarded as confidential and naturally give to the man great influence over the woman with whom he has entered into an engagement of marriage."

Some of the cases hold that a contract barring dower will not be upheld unless it secures for the wife a provision for her

support after the death of her husband. *Estate of Pulling,* 93 Mich. 274, 52 N. W. 1116; *Mowser v. Mowser,* 87 Mo. 437; *Graham v. Graham,* 67 Hun, 329, 22 N. Y. Supp. 299. We do not approve of this broad rule, however. The foregoing decisions, as well as many others that might be cited, indicate the attitude of courts toward contracts of this character, and the alacrity with which they grant relief from bargains improvidently made either through ignorance or misrepresentation, where unfair and inadequate provision is made for the support of the wife upon the death of her husband.

The contract before us was apparently made with deliberation. It was prepared and signed some time before the marriage took place, and was submitted for examination and approval to a brother of the petitioner, with whom she lived, and there is no pretense that its provisions were not carefully read over and considered by *Mrs. Deller.* If we should accept the construction of the contract contended for by the executors, we would be unable to say that the provision made for the petitioner was so inadequate that the contract could not be sustained, even if we adopted the view that such a contract might not be enforced because of the mere insufficiency of the provisions made for the intended wife. In such respects as the contract may be doubtful or ambiguous as to what the parties intended, and will therefore admit of more than one construction, that most favorable to the widow should be adopted, if consonant with reason, and if no violence is done to the language used in arriving at such construction. But in construing a valid antenuptial contract no exception should be made to the general rule that the intention of the parties is controlling and must govern. *Mintier v. Mintier,* 28 Ohio St. 307. And in the absence of fraud and unfair dealing the parties should be left where they placed themselves. *In re Devoe's Estate,* 113 Iowa, 4, 15, 84 N. W. 923; *Thompson v. Tucker-Osborn,* 111 Mich. 470, 69 N. W. 730; *McNutt v. McNutt,* 116 Ind. 545, 19 N. E. 115; *Forwood v. Forwood,* 86 Ky.

114, 5 S. W. 361; *Naill v. Maurer,* 25 Md. 532; *Smith's Appeal,* 115 Pa. St. 319, 8 Atl. 582; *Estate of Kesler,* 143 Pa. St. 386, 22 Atl. 892; *West v. Walker,* 77 Wis. 557, 46 N. W. 819.

The questions directly involved on this appeal are whether the petitioner could by an antenuptial agreement waive and surrender the rights given to a widow by sec. 3935, Stats. (1898), and whether, by the terms of her contract, she did so. Subd. 2 of the section makes provision for an allowance to the widow by the county court for her support and maintenance during administration proceedings and before she is awarded the distributive share in the estate to which she may be entitled. It is obvious that some time must elapse after the death of her husband and before the terms of an antenuptial agreement can be complied with, during which period the widow may have no means of support. This court has held that it is against the policy of the law to permit a debtor to waive the benefit of exemption laws. *Maxwell v. Reed,* 7 Wis. 582; *Hiles v. Milwaukee P. & L. Co.* 85 Wis. 90, 55 N. W. 175. Whether the two situations are not analogous to such an extent that the rule should be extended to contracts like the one before us is not wholly free from doubt. The decision in *Maxwell v. Reed* seems to be based largely on the provisions of sec. 17 of art. I of our constitution, which makes it the duty of the legislature to enact wholesome exemption laws. This provision has no application to the contract before us. Our attention has not been called to any decision where it is held that the provisions of a statute of like tenor might not be waived by antenuptial contract. There are a number of courts that have adopted the contrary view, as will be seen from an examination of the following cases: *Staub's Appeal,* 66 Conn. 127, 33 Atl. 615; *Cowles v. Cowles,* 74 Conn. 24, 49 Atl. 195; *Shaffer v. Matthews,* 77 Ind. 83; *McNutt v. McNutt.* 116 Ind. 545, 19 N. E. 115; *McMahill v. McMahill,* 113 Ill. 461; *Young v. Hicks,* 92 N. Y. 235; *Tiernan v.*

Binns, 92 Pa. St. 248; *Paine v. Hollister,* 139 Mass. 144, 29 N. E. 541. And in *West v. Walker, supra,* it is said that the antenuptial agreement determines the entire interest which the widow may claim in the estate of her husband, where the contract so provides. The right to an allowance under sec. 3935, Stats. (1898), was not before the court in that case, however, so that the general language used was broader than was necessary. It should be stated that the Illinois court holds that the statutory provision cannot be waived where there are children born of the marriage who are alive at the time of the death of the husband. *Zachmann v. Zachmann,* 201 Ill. 380, 66 N. E. 256; *Merki v. Merki,* 212 Ill. 121, 72 N. E. 9. The Michigan court, which has adopted an extreme view in construing certain antenuptial contracts as not precluding the widow from claiming an allowance during the pendency of the administration proceedings, nevertheless does hold impliedly at least that such an allowance might be barred by an express provision in the contract to that effect. *Pulling v. Durfee,* 85 Mich. 34, 48 N. W. 48; *Bliss v. Livingston,* 149 Mich. 271, 112 N. W. 911. Where the widow is fairly provided for by the antenuptial contract, there is slight danger of her suffering undue privations or becoming a public charge during the interim between the death of her husband and the time when her share can be lawfully paid in whole or in part. She can ordinarily secure credit on the strength of what is coming to her, or, by incumbering her share in the estate, secure the funds necessary to meet her needs. It will seldom be necessary that any considerable period of time should elapse between the death of the husband and the payment of at least a portion of the consideration named in the antenuptial agreement. In the case at bar the husband died on June 19, 1907, and the amount stipulated in the contract was paid on January 22, 1908. It frequently happens that personal representatives of decedents are not in a position to pay the statutory allowance in less time than that which elapsed in the present

case. We conclude that we should follow the decided cases on the subject, and hold that an antenuptial contract otherwise valid, which precludes the widow from claiming the allowances provided for by sec. 3935, Stats. (1898), is enforceable.

By the contract it was stipulated that the petitioner should receive the considerations named therein "in lieu of her dower right in the estate of said Joseph Deller, and in lieu of all right, title, and interest which she would have by law in the said estate." Petitioner further agreed that the pecuniary provision made for her should be in full satisfaction of her dower and should bar her from claiming the same, and she also agreed not to "claim any share" in the personal estate of the decedent.

When the widow asserted her supposed right under the provisions of subd. 1 of sec. 3935, it would seem to be too plain to admit of argument that she was claiming a share in the personal estate of her deceased husband. When she made her claim under subd. 2 of the same section for an allowance for her support, it would seem equally clear that she was asserting a right which is given to widows by law and by law only, and a right which she expressly waived by her contract. We see no ground for saying that the right which the petitioner waived was a right to a distributive share in the estate only. The contract does not say so. It does say that for the considerations therein named she waives all right, title, and interest she would have by law in the estate. When she asks that a very considerable sum of money be paid her, which can only be paid by turning over a portion of the estate, or of the proceeds derived from the sale thereof, a claim is necessarily made to a share of the estate. Without a manifest perversion of the plain and comprehensive language used by the parties in making their contract, we fail to see how the court could construe the contract as precluding the widow from participating in a distributive share of the estate only. The obvious intention of the parties, when expressed in plain language,

cannot be ignored and some elastic rule of construction substituted in its stead, from which some different intent may be argued out. A like construction has been placed by other courts on contracts of much the same tenor and effect as the one before us. *Staub's Appeal,* 66 Conn. 127, 33 Atl. 615; *Cowles v. Cowles,* 74 Conn. 24, 49 Atl. 195; *Shaffer v. Matthews,* 77 Ind. 83; *McNutt v. McNutt,* 116 Ind. 545, 19 N. E. 115; *McMahill v. McMahill,* 113 Ill. 461; *Young v. Hicks,* 92 N. Y. 235; *Tiernan v. Binns,* 92 Pa. St. 248. The contrary view is expressed in the Michigan cases heretofore cited. We think the court erred in permitting the widow to recover the allowances provided for in subd. 1, 2, sec. 3935, Stats. (1898).

The trial court found as a conclusion of law that the antenuptial agreement on its face, and without the aid of any extrinsic evidence, contains and imports a promise on the part of the decedent to maintain and support the petitioner during her natural life in addition to giving her the specific sum of $5,000. The right of the widow to an allowance for her support during life under and by virtue of the contract is not immediately involved on this appeal, but it is involved in another proceeding pending in the county court of Milwaukee county between the same parties. The facts and the law necessary to a decision upon the question have been fully presented and argued, and counsel on both sides have united in a request to the court to decide the question and save expense to the parties in interest by bringing the litigation to an end. There is some relation between the two proceedings. Primarily what the widow wants is a provision for her support. Whether she gets this under the contract or by virtue of the statute is not particularly important provided she gets it. In view of the situation presented it has been deemed best to decide the question.

It is the opinion of the court that the antenuptial contract should be construed as giving to the petitioner the sum of

$5,000, together with a reasonable provision for her support during her natural life. Some of the members of the court reach this conclusion from the instrument itself, unaided by extrinsic facts, not regarding the contract as ambiguous or calling for any elucidation by extraneous evidence; others, while considering the contract in itself ambiguous, reach the same conclusion by construing it in connection with the evidence offered to explain the ambiguity.

The parties to the litigation all concede that, if the postnuptial contract changes the former one, it cannot be upheld. It is of value only in arriving at what the parties meant and intended by the former contract.

The petitioner appeals from the allowance of $60 per month made her by the county court on the ground that the same is inadequate. In view of the conclusion reached, the question is only important by reason of the bearing it might have on future proceedings. We think the allowance was reasonable in amount.

By the Court.—Judgment is reversed on the appeal of the contestants, and the cause is remanded for further proceedings according to law.

MILWAUKEE ELEVATOR COMPANY, Appellant, vs. FEUCHTWANGER, imp., Respondent.

December 9, 1909—January 11, 1910.

Appearance: General or special?

Appearance by a defendant specially for the purpose only of moving that the service of summons be set aside and the action dismissed with costs, does not constitute a general appearance.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Olwell & Drought,* and oral argument by *L. A. Olwell.*

For the respondent the cause was submitted on the brief of *F. C. Eschweiler.*

WINSLOW, C. J. The defendant is a nonresident of the state, and the summons herein was served upon him while he was temporarily in the state, in actual and necessary attendance upon court in an action to which he was a party, and hence exempt from the service of process. Upon motion the service was set aside and an order made dismissing the action with motion costs. From this order the plaintiff appeals on the ground that, although the defendant stated that he appeared specially, his motion was not merely to vacate the service, but to dismiss the action with costs.

It is undoubtedly true that in some jurisdictions such a motion constitutes a general appearance, but this court, in *Kingsley v. G. N. R. Co.* 91 Wis. 380, 64 N. W. 1036, held that the identical motion made here did not constitute a general appearance. Following that case, the order appealed from must be affirmed.

By the Court.—It is so ordered.

Voss, Respondent, vs. STOLL and another, Executors, imp., Appellants.

December 9, 1909—January 11, 1910.

Action: Abatement and revival: Special proceeding: Appealable order.

1. A proceeding to revive an action as to a deceased party is a special proceeding, and a final order granting or refusing the request is appealable, but an intermediate order contemplating further judicial action in the matter is not.
2. A motion to revive an action as to a deceased party is addressed to the sound discretion of the court.
3. When it is not reasonably necessary to revive an action as to a deceased party for the due protection of the one requesting the revival, the request should not be granted.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Appeal dismissed.*

Action commenced by one nonresident against two others to enforce a cause of action for wrongful conversion of personal property. Service of the summons was made on James S. Stoll, one of the defendants, while he was temporarily in this state solely to obtain medical treatment for something akin to insanity. Service was not made on the other defendant. The one served was duly arrested, pursuant to the statute in such cases. He secured his release by giving cash bail in the sum of $2,000. He appeared in the action by attorneys, but died without answering. Thereafter an affidavit, showing the fact of service and that of death, was served on the attorneys who had appeared for the defendant served, with a notice to the effect that application would be made to the court for leave to continue the action against the personal representative of the deceased, who resided in a sister state where the estate was in process of administration, and to permit of a proper amendment of the record being made, and that, unless such representative showed cause to the contrary within twenty days after the service, exclusive of the day thereof, the action would be deemed revived and would stand accordingly. Such notice was duly placed in the hands of the proper officer in this state for service, who made due return, that neither the representative nor Charles H. Stoll, defendant not served, could be found in this state and that neither of them resided therein. Thereafter, on an affidavit on behalf of plaintiff setting forth only the facts aforesaid, an order was made for service of the notice on defendant *John G. Stoll* and on the personal representative of the deceased, James S. Stoll, by publication or service outside of the state as in case of service of a summons upon nonresident defendants.

On the hearing of the application due proof was made of service of the notice and affidavit upon the attorney who appeared for James S. Stoll in his lifetime and upon the per-

sonal representative. Proof was also made that the cause of action was one which survived according to the law of the state where it arose as well as under the law of this state. There was also due proof that the deceased left no property in this state; that all property left by him came to the possession of his personal representative outside of this state, who resided in Kentucky; that the administration of the estate was under judicial supervision wholly in that state; that the defendant not served was within easy reach of the plaintiff for any judicial proceeding he might be competent to commence to enforce his claim; and that such defendant was able to respond for any sum that might be adjudged against him at plaintiff's suit. Plaintiff gave as a reason for seeking to enforce his claim in this state instead of that where the cause of action arose, that he feared he could not obtain justice in the latter state because of the personal influence of the Stolls and their friends. There was further proof that in an action in a competent court in the state of Kentucky, but in which the plaintiff was not a party, the title to the property alleged to have been wrongfully converted was adjudged to be in James S. Stoll; that such property, certain warehouse receipts, was ordered to be and was filed in court, and plaintiff, though having notice of all such facts, made no move to recover of defendants till some over two years after the alleged conversion and till James S. Stoll chanced to be, temporarily, in this state for treatment for partial insanity, which soon thereafter totally incapacitated him for business and terminated in his death.

The personal representatives of the deceased defendant appeared only for the purpose of opposing the motion. The court at first disposed of the matter as indicated in the following language:

"Under our statutes, secs. 2800, 2803, and 3267, and in furtherance of justice, this action should be revived against the representatives of the deceased defendant.

"The motion to revive, etc., by plaintiff is therefore granted. I rest this decision upon the case of *Brown v. Brown,* 35 Minn. 191, 28 N. W. 238."

Later a formal order was entered that the personal representatives appear and answer within a time named, or "in default thereof the plaintiff may apply to the court for an order entering their appearance and directing the action to stand revived and continued," etc.

From such order this appeal was taken.

For the appellants there was a brief by *Miller, Mack & Fairchild,* and oral argument by *W. F. Adams.*

For the respondent there was a brief by *Julius E. Roehr,* and oral argument by *C. Steinmetz, Jr.*

MARSHALL, J. The order did not "terminate the action and prevent a judgment from which an appeal might be taken;" satisfying subd. 1, sec. 3069, Stats. (1898). Unless it is a "final order affecting a substantial right," made in a special proceeding; satisfying the next subdivision of the appeal statute, the appeal must be dismissed.

The cause of action was one which survives, as appears, under the law of the state where it arose as well as under the law of this state.

Sec. 2800, Stats. (1898), provides that "an action does not abate by the death of a party" thereto in such cases as this, but it may be revived or continued in the manner provided in sec. 2803, or that provided in sec. 2810 of the statutes.

The words, "shall not abate" in the first section, and the words, "on motion . . . may allow or compel the action to be continued," etc., in the second section and the terms, "revived or continued" and "stand revived or continued," in the third section must be construed together. So construed the meaning of the written law is that, in the circumstances of this case, till changed by order of the court under the statute, the action is to be regarded as practically dead, though really only

in a terminable slumber. That is, the idea of the statutory terms, "shall not abate" but "may be revived" means that though it shall die yet it may live again. That renders logical the doctrine that, in general, any judicial act, in a case of this sort, after the death of a party, before the action shall have been revived as to him, is a nullity as regards his personal representative. *La Pointe v. O'Malley,* 47 Wis. 332, 339, 2 N. W. 632. There the court, in effect, decided that the real meaning of the statute is that, in the circumstances here, the action is not finally but is temporarily abated. Therefore, until it is revived by judicial act, there is no action, strictly speaking, in which a motion can be made. So the proceeding required to revive is one outside of any action and for the purpose of restoring to the inanimate thing, as it were, the breath of life. Such proceeding can only properly be denominated a special proceeding under sec. 2596, Stats. (1898).

The test to be applied in determining the nature of any judicial remedy, as regards whether it is a special proceeding, is whether it is a mere proceeding in an action, or one independently thereof or merely connected therewith. The latter two belong to the special class and the other does not. *State v. Wis. T. Co.* 134 Wis. 335, 113 N. W. 944.

The next question is, Was the order final? It was evidently entered after rendition of the opinion which seems to contain a decision granting the motion to revive. That opinion and decision, on the face, seem to have left nothing to be done to fully restore the action. However, it was followed by a formal order by which the learned court seems to have industriously reserved the question of revival, sufficiently to enable him to consider the matter again before finally granting the motion. Why that was done we do not know. We must presume, from the peculiar nature of the order entered, after a judicial declaration in terms reviving the case, providing that the moving party in a specified contingency might apply to the court for an order reviving the case, was the re-

sult of a wise afterthought to take up the matter again before finally compelling the foreign party to litigate in this state.

There are a number of indications that the learned court, after filing the opinion with words of final decision, concluded to merely enter a sort of tentative order, so that if it did not operate to induce the personal representatives to voluntarily appear, a more careful consideration might be given to the matter before applying coercion.

It may be that the learned judge discovered that sec. 3267, Stats. (1898), upon which he in part relied, relates to the right of a foreign executor to sue or be sued in the courts of this state with reference to the property of the deceased therein, and has nothing to do with circumstances as in this case. He may also have come to doubt whether *Brown v. Brown,* 35 Minn. 191, 28 N. W. 238, dealing with the question of reviving, on motion of a nonresident personal representative of a deceased person, a proceeding to open a default judgment against the deceased, had anything to do with such a situation as he had before him.

Again, after rendering the opinion, the peculiar wording of secs. 2803 and 2805, Stats. (1898), in connection with *Cavanaugh v. Scott,* 84 Wis. 93, 54 N. W. 328, may have more particularly challenged judicial attention to the fact that there is no absolute right of revival, and, in connection with that, it may have occurred that, possibly, the fact that a nonresident, after sleeping on his rights for some over two years, came here to pursue a sick man who was on the verge of insanity, all of whose property and that of another responsible party jointly liable with him was in a foreign state and within easy reach, as well as were the defendants pursued, of such nonresident from his place of residence, and kept up the pursuit after the death of the particular defendant, notwithstanding ample opportunity to litigate his rights in the home jurisdiction of the defendants, where the estate of the particular one was being settled, and without any explanation of such

peculiar method of attack, except that he was afraid of the personal influence of the defendants and their friends with the court, in their home jurisdiction; might not, after all, warrant the conclusion that justice required a revival of the action. The principles governing such a situation were not then as plainly found declared in the decisions of this court as they are now in *Allen v. Frawley,* 138 Wis. 295, 119 N. W. 565. Had they been the learned court would have had a safer guide than the Minnesota case which deals with a situation foreign to the one in hand.

All these considerations lead us to regard the order of the court as intended as merely intermediate, notwithstanding the language in the opinion and decision actually reviving the action.

It follows, that though the order in question was entered in a special proceeding, it was not a final order therein and, therefore, the appeal must be dismissed.

By the Court.—So ordered.

WHITE and wife, Respondents, vs. DANIELL, imp., Appellant.

December 9, 1909—January 11, 1910.

Homestead: Conveyance: Signature of wife: Deed as mortgage: Foreclosure: Judgment: Provision for reconveyance.

1. Where a deed conveying a husband's homestead was signed by the wife in order that it might be used as security for his debts, and it was in fact used for that purpose, the requirements of sec. 2203, Stats. (1898), were satisfied, even though the wife did not definitely know the amount to be secured.
2. A judgment establishing as a mortgage a conveyance of land which is absolute in form, and decreeing foreclosure thereof, need not provide that the mortgagee shall convey back the premises in case of redemption, such reconveyance not being essential to the re-establishment of the mortgagor's legal title, even of record. *Phelan v. Fitzpatrick,* 84 Wis. 240, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to foreclose as a mortgage an interest claimed to be held by the plaintiffs by virtue of a warranty deed from the appellant and her husband, Edward M. Daniell, of the latter's homestead. It appeared and was found by the court that in about the month of August, 1903, Daniell was liable to the other heirs at law of his deceased father, as administrator of his estate, and they were pressing for settlement; that said heirs consisted of the plaintiff *Mary E. White* and of the two brothers; that he was without means to pay; that plaintiff *T. Stewart White,* husband of the sister *Mary,* proposed to Daniell to make settlement of said claims upon conveyance of the latter's homestead as security. Accordingly a warranty deed to *T. Stewart White* was prepared, executed by Edward M. Daniell and also by the appellant, *Johanna M. Daniell,* who inquired its purpose, and was told that it was to be used as security for the money necessary to settle the father's estate. She signed upon that statement without knowledge of the amounts so necessary. *T. Stewart White* furnished the means of settlement with the two brothers of Daniell, and received from the latter promissory notes for the amounts in the sums of $375 and $800, with notation thereon that they were secured by deed in escrow. The liability to *Mary E. White,* after some negotiation, was adjusted at something over $1,800, for which a note of $1,500 was given to her and declared to be secured by said deed, the remainder not being so secured. The deed meanwhile was delivered over to *T. Stewart White* to hold as security for these promissory notes, he procuring from the several heirs proper acquittance of the defendant Daniell as administrator, so that he was discharged.

The court adjudged the deed a mortgage securing the three notes above mentioned, ascertained the amount thereof, and entered the usual judgment of foreclosure with directions for

sale after a year and with the right of redemption meanwhile expressly reserved. The judgment contained no provision for the revesting of the legal title in case of such redemption. No judgment for deficiency was ordered. From this judgment the defendant *Johanna* appeals.

J. E. Wildish, for the appellant.

Fred B. Peterson, attorney, and *William Kaumheimer,* of counsel, for the respondents.

DODGE, J. The finding of the court, substantially to the effect that the deed was used for the purposes for which it was executed by the wife, *Johanna M. Daniell,* is sufficiently supported by evidence; indeed is hardly antagonized in any way except by the assertion that her knowledge as to the amount to be secured was wholly indefinite. That fact existing, the statute (sec. 2203, Stats. 1898) requiring that any conveyance or incumbrance of the homestead must be executed by the wife is satisfied. There is no dispute that the judgment correctly defines the indebtedness agreed to be secured by the deed. It therefore correctly adjudges a foreclosure thereof as a mortgage and sale in the manner prescribed by statute for mortgages.

Appellant, without having assigned error thereon, criticises the judgment because it fails to provide that the plaintiff shall convey back the premises in case of redemption, which was held to be a necessary provision in *Phelan v. Fitzpatrick,* 84 Wis. 240, 54 N. W. 614. While doubtless such a conveyance might properly be required in protection merely of the direct chain of record title, it is in no wise essential to the re-establishment of defendants' complete legal title. The judgment establishes that the deed from defendants to plaintiff is a mortgage, and if the record of that judgment discloses full redemption it must of necessity declare plaintiff's interest at an end. The legal title has at all times remained in the defendants, and this deed, accompanied by the adjudication that

it is a mere mortgage, creates nothing but a lien thereon. *Cumps v. Kiyo,* 104 Wis. 656, 659, 80 N. W. 937. It will be fully discharged by satisfaction of the judgment, which may be recorded in registry of deeds. Sec. 2236, Stats. (1898).

In the *Phelan Case* the chain of title was confused by the fact that the deed to the plaintiff, held to be a mortgage in that case, did not run directly from the defendants, the legal owners, but from the sheriff upon a prior foreclosure judgment of another mortgage. Besides, there was at that time no statutory provision for recording such judgments with register of deeds as now. Sec. 2236. There was therefore more ground for requiring a reconveyance from the mortgagee upon a satisfaction of his foreclosure judgment in that case than in the present instance, where defeating the deed upon which alone the plaintiff's title rests necessarily re-establishes the defendants' title even of record. The non-necessity of a reconveyance from the mortgagee in such a case as this was inferentially declared without express consideration in *McFarlane v. Louden,* 99 Wis. 620, 75 N. W. 394. We are convinced that no prejudice can result to the defendants from such omission from the present judgment.

By the Court.—Judgment affirmed.

TIMLIN, Respondent, vs. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellant.

December 9, 1909—January 11, 1910.

Life insurance: Attached papers constituting policy: Delivery: Evidence: Transactions with persons since deceased: Construction of contract: Tontine policy.

1. In an action upon a life insurance policy, plaintiff having produced a policy in the usual form (delivery of which was admitted) to which was pinned a smaller sheet of paper partly printed and partly written and not signed, the evidence (stated in the opinion) is *held* sufficient to show that both papers were

delivered to him simultaneously by defendant in carrying out the negotiations for a policy.

2. Plaintiff's testimony tending to show delivery of both papers to him was not incompetent, although the agent was dead with whom he negotiated and in whose handwriting the written parts of the annexed paper were,—the facts testified to not being such as to exclude a delivery other than by such agent.

3. The larger paper—being the usual form of policy—contained a provision that upon completion of the tontine dividend period the assured should have various options, one being to continue the policy for the original amount and apply the tontine dividend to the purchase of an annuity, the amount of dividend or of the annuity not being stated; also a provision stating that "the contract between the parties is completely set forth in this policy . . . and none of its terms can be modified except by an agreement in writing, signed," etc. The smaller paper, after stating that "these estimates are the authorized figures of the society" and describing the policy, continued: "If policy-holder is alive and policy is in force at the end of tontine period, you are then entitled to either of the following options." Following this was an option for a cash withdrawal, in which it was stated that the "guaranteed surplus is estimated at" a certain amount; and there was a further option to take a life annuity increasing annually, beginning with a certain sum, besides having the policy continued without cost for the original amount. *Held*, that the two papers thus delivered constituted the contract of insurance between the parties.

4. Differences between the two papers in texture, color, or quality have very slight weight in such a case in determining whether the contract is contained in both or in one only.

5. The obligation of the insurance company to the policy-holder under a tontine policy is that of a debtor to a creditor.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

In March, 1886, the parties to this action entered into a contract of insurance, whereby the defendant, in consideration of the annual payment for twenty years of the sum of $33.26, insured the life of the plaintiff, under the semi-tontine plan, in the sum of $1,000; the tontine dividend period for the policy to be completed in the year 1906.

The plaintiff possessed two sheets of paper pinned together (Exhibit 1, pages A and B), and alleges that they together embody the contract. The larger sheet (Exhibit 1, page A),

which was partly written and partly printed, was in the usual form of a life insurance policy. Upon the back of this sheet, among the requirements and provisions of the contract of insurance, was printed the following:

"5. That upon the completion of the tontine dividend period on March 19, 1906, provided this policy shall not have been terminated previously by lapse or death, the said *William H. Timlin* shall have the option either: First, to withdraw in cash this policy's entire share of the assets: *i. e.* the accumulated reserve, which shall be five hundred and fourteen and 31-100 dollars, and in addition thereto, the surplus apportioned by this society to this policy; secondly, to convert the same into a paid-up policy for an equivalent amount, provided always that if the amount of said paid-up policy shall exceed the original amount of the assurance, a satisfactory certificate of good health from one of the society's medical examiners shall be required; thirdly, to withdraw in cash the share of the accumulated surplus apportioned by said society to this policy, and continue the policy in force on the ordinary plan; or fourthly, to continue the assurance for the original amount, and apply the entire tontine dividend to the purchase of an annuity, the amount derived from such annuity, together with the annual dividend on this policy, shall be paid in cash to said *William H. Timlin,* or assigns."

The smaller sheet, attached by a pin to the larger sheet, was partly printed and partly written and was as follows:

"THE NON-FORFEITABLE AND INCONTESTABLE SEMI-TONTINE POLICY.

"*Equitable Life Assurance Society of New York.*

"(These estimates are the authorized figures of the society.)

"Policy, $1,000.00. Age 34. Annual Premium $33.26. Total cost in 20 years, $665.20. Kind of policy—Life in 20 payments; Tontine 20 years.

"If policy-holder is alive and policy is in force at the end of tontine period, you are then entitled to either of the following options:

1st.	Withdraw in cash—	
	Guaranteed legal reserve in policy is	$514 31
	Guaranteed surplus is estimated at	591 69
	Total, Cash	$1,106 00
2nd.	Take paid-up policy, if in good health, for	$2,150 00
3d.	Take a life annuity, increasing annually, beginning with	53 47
	And besides have your original policy carried till death, free of cost, for	$1,000 00

"This pays you —— per cent., simple interest, or 4.40 per cent., compound interest, besides you have been insured 20 years for $1,000.00, without cost."

Along the side of this smaller sheet was the following:

"Tontine is a premium on living, not on dying.

"The best insurance ever devised for successful men.

"No technicalities—if we insure you we will pay your claim."

The annual payments of premiums were made as required, and at the expiration of the twenty years the plaintiff notified the defendant that he elected to take a life annuity and to have his policy carried until his death at the sum of $1,000, in accordance with the third option and upon the terms agreed upon and embodied in page B, the smaller of the two sheets of paper. The defendant refused to allow the plaintiff an annuity of more than $19.85 per year. Plaintiff brought action to enforce his claim, alleging that it had been stipulated in the agreement that the annuity, beginning at $53.47 and increasing annually, should be for life, and that he was entitled to its value, namely, $750.

There is no controversy but that plaintiff performed the conditions of the policy by furnishing a proper health certificate and by giving notice of his election. The plaintiff testified that he received the policy at about the time it bore date or shortly thereafter; that the two pages are now and have remained attached while in his possession, in the form and manner they were in when produced on the trial; that its condition is now the same as it was when he received it; that he made his payments in reliance upon the conditions and stipulations of both pages A and B; and that the agent with whom he carried on the negotiations for the policy is now dead.

This is an appeal from the judgment rendered on the verdict which was directed by the court in favor of the plaintiff.

For the appellant the cause was submitted on the briefs of *Winkler, Flanders, Bottum & Fawsett.* They contended, *inter alia,* that the paper in question, construed as a promise on the part of the defendant to pay a fixed sum as surplus, in cash or in the form of an annuity, at the expiration of the tontine dividend period, was wholly inconsistent with the pol-

icy applied for by plaintiff, and directly contradicted the terms of the paper signed and authenticated as the contract, and which corresponded precisely with what plaintiff applied for. *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 338; *Avery v. Equitable L. Assur. Soc.* 117 N. Y. 451; *Langdon v. Northwestern Mut. L. Ins. Co.* 116 App. Div. 558, 101 N. Y. Supp. 914; *Untermyer v. Mut. L. Ins. Co.* 128 App. Div. 615, 121 N. Y. Supp. 221; *Horncastle v. Equitable L. Assur. Soc.* 22 Times Law Rep. 735; *Ruse v. Mut. B. L. Ins. Co.* 23 N. Y. 516; *Clinton v. Hope Ins. Co.* 45 N. Y. 454; *Vilas v. New York Cent. Ins. Co.* 72 N. Y. 590; *Planters' Mut. Ins. Co. v. Rowland,* 66 Md. 236, 7 Atl. 257; *Stone's Adm'rs v. U. S. C. Co.* 34 N. J. Law, 371.

For the respondent there was a brief by *Nathan Glicksman* and *W. L. Gold,* and oral argument by *Mr. Glicksman.*

SIEBECKER, J. Under the issues raised by the pleadings and the evidence the controversy between the parties presents the questions: first, Were the two sheets of paper, marked "Pages A and B of Plaintiff's Exhibit 1," as produced by the plaintiff, delivered to him by the defendant? and secondly, Do they together embody the life insurance contract made by the parties?

It is contended by the defendant that there is no proof that page B was ever delivered to the plaintiff by the defendant. The defendant admits that shortly after its date it delivered the sheet marked "Page A" to the plaintiff. The plaintiff testified that no one was authorized to receive the policy for him; that he had possession of it from the time of its manual tradition to him to the time he gave it to his attorney in this action; that the sheets had always been united by being pinned together, and that the two sheets have been inclosed in the envelopes in which they were received by him, in the same form and condition while so in his possession as they were when he produced them. Plaintiff also testified that he re-

ceived no other writing or paper pertaining to this contract, and that he paid the annual premiums as required thereby.

The facts and circumstances of the transaction tend to support the trial court in its conclusion of fact that page B was delivered to the plaintiff simultaneously with page A. It is claimed that if there was delivery of both pages to the plaintiff the evidence is conclusively to the effect that the agent, Jones, now dead, so delivered them, and hence all of the plaintiff's evidence bearing on this fact is incompetent. The evidential facts of the transaction do not so impress us. The facts and circumstances showing tradition of pages A and B by the defendant to plaintiff do not exclude means of delivery other than by the agent, Jones. As has been suggested, it may have been accomplished by mail or through other appropriate channels or some other authorized person. In the light of the facts and circumstances shown, plaintiff's possession and production of pages A and B sufficiently establish that they were transmitted to him by the defendant in carrying out the negotiations for the contemplated life insurance policy. It is, however, averred that the fact of such delivery of page B is no proof that the statements therein are a part of the insurance contract made by the parties. True, such delivery in itself is not proof conclusive that the writing on this page embraces a part of the contract, but such fact, in connection with the other facts of the transaction, has a material and significant bearing, and tends to show that the contents of this page embody a part of the negotiations had between the parties and that they are expressed in the writing.

It is argued that the provisions contained in page A show that it was understood and stipulated that this sheet embraced the whole contract and therefore that page B is excluded therefrom. Stress is placed on the provision that "the contract between the parties hereto is completely set forth in this policy, and the application therefor, taken together, and none of its terms can be modified, . . . except by an agreement in

writing," signed by one of the authorized officers. There is nothing in this provision excluding page B from being a part of the policy, for the question remains: What, under this provision, constitutes the policy? Plaintiff asserts that it consists of the agreement set forth on pages A and B, while the defendant claims that page A alone covers it. We do not consider that the words "this policy," as used in this provision, restrict it to page A. The term as here used is applied to the contract made by the parties, and in this connection embraces the agreements of the parties, whether embodied in page A or in both pages A and B. We cannot, therefore, from these words determine whether the contract of the parties is included in page A or in both pages A and B.

It is urged that the provisions contained in page B, in connection with its physical appearance and the manner of its attachment to page A, indicate that page B is not a part of the written contract made by the parties. Upon this point the argument is made that in their very nature the contents of page B are manifestly mere statements made by the soliciting agent and mere inducements held out by him to induce the plaintiff to take the policy of insurance as set forth on page A, and that the appearance of page B, in the handwriting of Jones, the soliciting agent, is a persuasive fact confirming this claim. The contents of page B are of the nature and form which significantly indicate their purport. They are expressive of promises and agreements. For example, the following: "If policy-holder is alive and policy is in force at the end of tontine period, you are then entitled to either of the following options." This language is followed by provisions which specifically set out the options, and at the bottom of the page the statement is made that the investment will pay a specified amount of compound interest, and, without cost, will insure the plaintiff for twenty years for the amount named in the policy. These portions are clearly expressive of promises and are phrased in appropriate language of contractual obliga-

tions. When read in connection with the other page of the contract they have probative force as showing that the parties considered both pages together in their negotiations, and they tend to support the claim that they are part of the contractual transaction. The physical appearance of the sheets, as presented by the differences in the texture, color, or quality of the paper, has very slight weight in determining the question at issue. It is readily perceived that such differences do not negative the probability that these sheets were used by the parties to write the contract made by them.

The contention is made that the temporary union of pages A and B, effected by means of a pin, shows that the parties did not regard them as one document, and it therefore negatives the claim of plaintiff that they together set forth the agreement. This fact has intrinsic evidential force in throwing light on the other facts of the transaction from which the intent of the parties must be gathered. Considering the facts of the transaction it manifestly corroborates the claim that the subject matter and the contents of both pages were treated as material parts of the negotiations, and that the contents of both express the result thereof, and it tends to show that the two pages were incorporated as "the policy" to conform to the requirements and conditions on page A.

Much stress is placed on the use of the word "estimate" on page B as indicating that this page is merely a statement to show plaintiff the hoped for results of a contract such as is embodied in page A. We must look to the connection in which the word is employed. It is shown to refer to a future condition, namely, the financial value of the contract judging from the present knowledge, which is derived from the experience of the company in carrying this class of contracts. Manifestly, such knowledge did not furnish an absolutely definite basis for determining the financial value of the contract at maturity. It is however well known that persons are constantly undertaking definite financial obligations regarding

affairs wherein the financial results are as uncertain as they were in this transaction. While this element was present it was one which the parties might well agree to fix definitely by an estimate based on the results theretofore ascertained from the experience of the company in this class of business under like conditions. We find nothing in the use of this word in the first option pertaining to the "guaranteed surplus" which necessarily implies or signifies that it referred to a problematical result. Its use, with the words "guaranteed surplus," naturally signifies that the parties fixed the surplus that was to be apportioned to this contract at maturity out of the surplus earnings. This meaning is corroborated by the other options, which are couched in words of clear meaning and definite promises. The option selected by the plaintiff contains a promise of a life annuity beginning with $53.47 and increasing annually, and also a promise to carry the policy for $1,000 free of cost until death. This in itself is an unambiguous promise and an assumption of an obligation by the defendant. It covers the liability of the company under the contract to administer the interests of a large number of persons to a fund held by the company for their benefit. In considering this phase of the case it should be borne in mind that the nature of the obligation of an insurance company to a policy-holder under the tontine dividend periods, as specified in this contract, is that of a debtor and creditor under the stipulations of the agreement. *Uhlman v. N. Y. L. Ins. Co.* 109 N. Y. 421, 17 N. E. 363; *Gadd v. Equitable L. Assur. Co.* 97 Fed. 834. Viewing the pages A and B in the light of their contents, we find that they obviously treat of the same subject matter, and that the various provisions are in accord and are harmonious and mutually complementary. It is manifest that the agreements of page B make definite and certain what was left indefinite in the fifth paragraph of "provisions and requirements" of page A. This seems a most natural and reasonable thing for a person to do in negotiating for

life insurance. The all-important questions for the applicant are the amount of the premiums and the financial value of the contract at its maturity. And so, here, it is evident that the plaintiff sought to purchase insurance that would yield him definite financial returns, and that the defendant company stipulated that the contract would yield the amounts specified in page B if it should be in force at the end of the tontine period. The argument of the defendant that the company did not so contract because the company was unable to make that certain which in its very nature is uncertain is fully met by the fact that they may and probably did have sufficient information on the subject to warrant them in undertaking this obligation. This is sustained by the statement on page B that "These estimates are the authorized figures of the society." It is evident that the parties agreed upon the amount to be apportioned to this policy under its provisions as a tontine dividend policy, a matter which is usually left unascertained. Provision is made that the company shall apportion it when the contract matures.

In the light of all the facts and circumstances of the case, we are persuaded that the defendant delivered Exhibit 1, consisting of pages A and B, as the contract of insurance, and that they together constitute the contract made by the parties. This result demands affirmance of the conclusions of the trial court respecting the facts and the law and of the judgment awarded.

By the Court.—Judgment affirmed.

TIMLIN, J., took no part.

PIERCE, Appellant, vs. STOLHAND, Respondent.

December 9, 1909—January 11, 1910.

Bills and notes: Consideration: Services: False representations: Evidence: Presumptions: Matters of opinion.

1. An agreement to perform services is a sufficient consideration for a note.
2. Proof that more than a year after plaintiff represented that she was the only person who could teach dermatology other schools of dermatology were advertised, did not show falsity of the representations, there being no presumption that such schools existed at the prior date.

[3. Whether or not such a representation related to a mere matter of opinion and hence, even if false, did not constitute actionable fraud, not determined.]

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This action was brought to recover on a $200 note given in part payment for services to be performed for defendant by way of instructions in dermatology. Under the agreement $300 was paid in cash and a note given for the balance of the agreed price of the instructions. The answer sets up fraud by way of false representations on the part of the plaintiff. A counterclaim was also pleaded setting up fraud and want of consideration and demanding recovery of $300 paid to plaintiff at the time of execution of the note. The case was tried by the court and a jury. Only three questions were submitted to the jury: (1) Falsity of the representations; (2) reliance upon them; (3) defendant's freedom from negligence. The court refused to submit the question of damages. The jury answered the three questions submitted in favor of the defendant. Plaintiff moved for a directed verdict, for judgment notwithstanding the verdict, and for a determination by the court of the issue of damages and other omitted issues, which motions were denied. Judgment was ordered for the defendant upon the verdict for $497, damages and costs. It was

further ordered that plaintiff pay $10, costs of motion for judgment. Due exceptions were filed by the plaintiff. Judgment was entered accordingly in favor of the defendant, from which this appeal was taken.

James D. Shaw, for the appellant.

For the respondent the cause was submitted on the brief of *A. C. Umbreit.*

KERWIN, J. The execution and delivery of the note being admitted, the burden was upon the defendant to prove her defense and establish the counterclaim. The note bears date January 16, 1900, and it appears that it was given for services to be performed after its execution. The evidence tends to show that prior to the execution of the note the plaintiff was engaged in business in the city of Milwaukee as a dermatologist and receiving for her services $4 per hour; that defendant applied to her to be instructed in the art, and was informed by plaintiff that a course of instructions would cost $500. The defendant, thinking the price high, made some investigation upon the subject and conferred with a reputable physician of Milwaukee and returned to plaintiff and closed the contract by giving the note in question and paying $300 in cash. The defendant received instructions from plaintiff at various times covering a period of four or five months, and in June, 1900, began work as a dermatologist in the city of Chicago and remained there about a year, during which time only two patients called upon her for treatment. She then gave up the business and shortly thereafter had a talk with plaintiff, in which she said she could not pay the note, but made no claim that she had been defrauded. The alleged false representations complained of are that plaintiff represented that no one else could teach defendant and that she could not get instructions elsewhere for less than $500; that plaintiff told defendant that she had instructed other women who were as proficient as plaintiff, and that there was no other school than

that taught by plaintiff. There is no doubt but that the agreement to perform the services was a sufficient consideration for the note. *Schoenmann v. Whitt,* 136 Wis. 332, 117 N. W. 851; *Marling v. FitzGerald,* 138 Wis. 93, 120 N. W. 388. Counsel for respondent seems to base his claim for affirmance upon fraud and want of consideration. As before observed, the agreement to perform services was a sufficient consideration, and there was no failure of consideration because it is undisputed that services were performed under the contract. Of course, if no actionable fraud was proved, then the respondent's case falls and no other question need be treated.

It is insisted by appellant that the representations relied upon by respondent as fraudulent to avoid the contract, namely, that the plaintiff was the only person who could teach dermatology, were not actionable, because not relating to facts susceptible of personal knowledge, but merely matter of opinion under the rule laid down in *Montreal R. L. Co. v. Mihills,* 80 Wis. 540, 50 N. W. 507, and *Sheldon v. Davidson,* 85 Wis. 138, 55 N. W. 161. But we find it unnecessary to decide this point, because we fail to find sufficient evidence to support a finding that the representations made were false. They were made in January, 1900. The evidence upon which defendant bases the falsity of the representations is in effect that after defendant gave up her office, which was more than a year after the representations are claimed to have been made, she learned through magazine articles or advertisements and by calling upon people in Chicago and New York that there were other schools. Now this evidence falls far short of establishing that the representations, even if actionable, were false when made. The fact that other schools were advertised more than a year after the representations were made and offering to furnish instructions for $75 did not establish that schools existed a year earlier where defendant could have been taught the art. There is no presumption that, because schools existed at a particular date, they existed a year ante-

rior to such date. Presumptions do not run backward. *Ellis v. State,* 138 Wis. 513, 119 N. W. 1110; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; 1 Greenl. Ev. § 41.

Holding as we do that the defendant failed to prove that the representations were false, no other questions need be considered.

Judgment should have been directed for the plaintiff for the amount due upon the note sued upon.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to enter judgment for plaintiff in accordance with the demand of the complaint.

CHICAGO, RACINE & MILWAUKEE LINE, Appellant, vs. WILMANNS and another, Receivers, Respondents.

December 9, 1909—January 11, 1910.

Receivers: Sale of property: Construction: Proceeds of collections.

An offer to purchase the entire right of a corporation and of its receivers in all the real and personal property described in the inventory, with a single exception not material here, was reported by the receivers to the court, and an order approving their acceptance of the offer followed the same language. The bill of sale or assignment executed by the receivers and confirmed by the court conveyed, among other things, all the right and title of the corporation and of the receivers "in and to each and all of the accounts receivable . . . as of June 17, 1908." *Held,* that the purchaser was entitled to have the proceeds of all accounts, appearing upon the inventory, which had been collected by the receivers after said date and before the sale.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Quarles, Spence &*

Quarles, attorneys, and *J. V. Quarles, Jr.,* of counsel, and oral argument by *J. V. Quarles, Jr.*

For the respondents there was a brief by *Austin, Fehr & Gehrz* and *McCabe & Dahlman,* and oral argument by *G. G. Gehrz.*

TIMLIN, J. In an action by Harry Zummach against Barry Brothers Transportation Company and others impleaded, the respondents were appointed receivers of the property of the Barry Brothers Transportation Company, which was duly inventoried and the inventory filed in court prior to December 5, 1908. Amongst the property listed in this inventory were two items as follows:

"Item 8. Accounts receivable, Milwaukee Station, consisting of uncollected freight bills acquired during the past ten years and since the organization of the company and carried on the books of the company at $9,858.40.

"Item 9. Accounts receivable, Racine Station, consisting of uncollected freight bills acquired during the last ten years and since the organization of the company and carried on the books of the company at $497.53."

On December 7, 1908, one E. W. Seymour, assignor of the appellant, made an offer in writing to the receivers to purchase "the entire right, title, and interest of said company and of you as receivers thereof in and to all of the real and personal property described and referred to in the copy of your inventory hereto attached and made part hereof, with the exception, however, of item 1 of personal property, namely, steamer Pere Marquette No. 5." The offer contained other matters not relevant here. The receivers reported this offer to the court on or about December 15, 1908. In that report they stated:

"After considerable negotiation" they succeeded in obtaining "an offer or proposition of one E. W. Seymour . . . for the entire right, title, and interest of said defendant company and of these receivers in and to a large part of the real and personal property, . . . including . . . all books of account,

business records, documents of said company prior to June 17, 1908, with the name and good will, which offer or proposition of said E. W. Seymour is hereto attached marked 'Exhibit A.' "

On December 16, 1908, the court made an order that the "offers or propositions of purchase and settlement, respectively, signed by E. W. Seymour (and other offers presented therewith) and referred to in and by copies marked Exhibits A and B, made part of said report and petition, be and the same hereby are approved and confirmed." The order went on and authorized the receivers to execute good and sufficient deeds of conveyance, bills of sale, and assignments to said Seymour and others of the entire right, title, and interest of said defendant corporation Barry Brothers Transportation Company and of said receivers thereof in and to all of the real and personal property which said purchasers by their said propositions or offers, respectively, agree to purchase, including to said Seymour (subject to a contract of even date) all books of account, business records, and documents of said company prior to June 17, 1908, with the name and good will. The receivers then executed to Seymour under date of December 16, 1908, an instrument of conveyance in and by which they sold, assigned, and transferred to said Seymour, his heirs, administrators, and assigns:

"the entire right, title, and interest of said Barry Brothers Transportation Company and of the undersigned, as such receivers thereof, in and to each and all of the accounts receivable, Milwaukee Station, of said company, carried on the books of said company at 9,858.41 dollars as of June 17th, 1908, consisting of uncollected freight bills evidenced by vouchers now in the office of said company at Milwaukee, Wisconsin. Also all of the accounts receivable, Racine Station, of said company, carried on its books at 497.53 dollars, as of June 17th, 1908, consisting of uncollected freight bills evidenced by vouchers in the office of said company at Racine, Wisconsin.

The circuit court on January 23, 1909, on report of the receivers that this sale was made and consummated, made an order confirming the sale. It was thereafter discovered by the appellant, transferee of Seymour, that the receivers had after June 17, 1908, and prior to the sale to Seymour, collected of said accounts at the Milwaukee station $988.09, and of the accounts at the Racine station $311.23. The appellant on verified petition made the foregoing facts appear to the court and asked that the receivers be required to pay the two sums last mentioned over to the appellant. The receivers resisted this application on the following grounds: First. That they had no authority to assign the accounts except such as remained unpaid and uncollected. Second. That Seymour "had full knowledge equal, or, as affiant is informed and verily believes, even superior to that possessed by said receivers as to which of said accounts receivable in question then actually remained uncollected and as to which of them had theretofore been paid and collected." This referred to the date of his offer. Third. That Seymour on December 5, 1908, made an offer in writing "for all the property, real, personal and mixed, including all accounts and bills receivable, prior to the receivership, all franchises, leases, and all other assets of every kind and nature that appear from the attached statement dated June 16, 1908, except all interest in the steamer Pere Marquette No. 5." That the receivers through their attorneys declined this offer, "because, among other reasons, the same was not limited to the then right, title, and interest of said receivers in and to the accounts receivable and other property and assets to which the same referred, but it was thereby sought to bind these receivers to make sale and assignment of certain designated property with representation as to the quantum and character of the same, and that after considerable negotiation said offer of December 7, 1908, was substituted in place of said previous offer of December 5, 1908." They also deny that they in fact sold or assigned or intended

to sell or assign the accounts receivable to Seymour which had theretofore been by them collected. There is no explicit statement that Seymour was by the receivers, or by any one for them, informed that part of these accounts had been collected, but there is explicit sworn statement by Seymour that he was not so informed and that he did not know.

The circuit court denied the petition of the appellant with respect to the two items of money, the proceeds of the collected accounts. The situation is quite unusual. The written instruments above quoted from seem to cover and convey the accounts as they appeared on the inventory on file, and the transfer from the receivers expressly conveys these accounts as of June 17, 1908. In addition to this, the offer of Seymour was for the entire right of the corporation or its receivers in and to all the real and personal property described in the inventory with a single specific exception. The order of the court approving the acceptance of Seymour's offer followed this language. The bill of sale or assignment by the receivers to Seymour was still more explicit, and the latter was confirmed by order of the circuit court. On the other hand, the learned circuit court, who had direction of the receivers, much knowledge and information concerning the circumstances, and great learning and experience in such matters, denied this petition. We are without aid or suggestion concerning the grounds of such denial. We have only the written instruments to guide us. But on the face of the writings as hereinbefore quoted it seems to us that the appellant upon a fair construction of these writings is entitled to the proceeds of the collected accounts, presumably in the hands of the receivers.

By the Court.—The order of the circuit court is reversed, and the cause remanded with directions to enter an order requiring the receivers to pay over the proceeds of the accounts collected by them and in their hands.

MOERING, JR., by guardian *ad litem*, Appellant, vs. THE FALK COMPANY, Respondent.

December 9, 1909—January 11, 1910.

Master and servant: Injury caused by incompetent fellow-servant: Evidence: Reputation for carelessness: Notice to master: Questions for jury.

1. Sufficient evidence to warrant a jury in finding that a servant was incompetent should be offered before evidence of his reputation for incompetency or carelessness should be received for the purpose of showing that the master was chargeable with knowledge of such incompetency.
2. The reputation which may be shown in such a case is the servant's general reputation among those acquainted with his work, not his reputation among a particular class which includes a part only of those having such acquaintance.
3. The fact that the servant alleged to be incompetent and other employees of defendant avoided careless acts of the character in question while defendant's foremen were about, might be significant on the question of actual notice to defendant, but cannot render incompetent the evidence as to general reputation.
4. Evidence tending to show facts calculated to give notice to the master of the habitual carelessness of a servant in the use of gasoline, together with evidence that the servant had a general reputation for such carelessness among those with whom he worked, is sufficient to make it a question for the jury whether, in the exercise of ordinary care, the master should have discovered that the servant was incompetent, and whether the master was negligent in failing to discharge him.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Action for damages for personal injury. The plaintiff was hired to assist a molder named Lesch in the employ of the defendant. Molds were frequently dried by pouring gasoline therein and setting fire to the same. Occasionally it was necessary to repeat the operation. On the day of the accident Lesch poured gasoline into the mold and instructed the plaintiff to get him an additional supply. After the gasoline was furnished, the plaintiff was instructed to get a facing and

started to do so. In the meantime Lesch poured fresh gasoline into the mould before the former supply had burned out. As a result the gasoline in the can took fire and the molder threw the same away. The can was so thrown as to come in contact with the plaintiff and he was badly burned in consequence thereof, and brings this action to recover damages for the injury so sustained.

The court directed a verdict for the defendant. It is conceded on the part of the plaintiff that he and Lesch were fellow-servants. Plaintiff based his right to recover on the ground that Lesch was an incompetent fellow-servant, and evidence was offered tending to show such incompetency. It was sought to charge the defendant with notice of such incompetency by offering testimony tending to show the general reputation of Lesch for carelessness in handling gasoline. Other testimony was offered by the plaintiff, which, he asserts, would warrant the jury in finding that, had the defendant exercised ordinary care, it would have discovered the incompetency of Lesch. The evidence pertaining to reputation was excluded by the court.

For the appellant there was a brief by *Rubin & Zabel,* and oral argument by *W. B. Rubin.*

For the respondent there was a brief by *Doe & Balthorn,* and oral argument by *J. B. Doe.*

Barnes, J. It is urged that it was competent for the plaintiff to prove the general reputation of Lesch among his fellow-servants for recklessness, and likewise his general reputation as to being careless in the use of gasoline, for the purpose of showing that if the defendant had exercised ordinary care it would have discovered such incompetency. The court admitted a portion of the evidence offered, excluded other portions, and finally held it all incompetent.

Sufficient evidence to warrant a jury in finding that the servant was incompetent should be offered before evidence of

reputation for incompetency or recklessness should be received. The court held in directing the verdict in this case, and we think correctly, that there was sufficient evidence offered to warrant the jury in finding that Lesch was guilty of habitual carelessness in the use of gasoline so as to make him incompetent. This being so, his general reputation for incompetency, among those acquainted with his work, is admissible as tending to bring notice of the incompetency to the master. Reputation among a particular class, which included but a part of those who knew his character or work, is inadmissible for this purpose. *Southern Pac. Co. v. Hetzer,* 135 Fed. 272; *Gulf, C. & S. F. R. Co. v. Hays,* 40 Tex. Civ. App. 162, 89 S. W. 29; *Green v. Western Am. Co.* 30 Wash. 87, 114, 70 Pac. 310; *Metropolitan W. S. E. R. Co. v. Fortin,* 203 Ill. 454, 458, 459, 67 N. E. 977; *Western S. Co. v. Whalen,* 151 Ill. 472, 38 N. E. 241; *Consolidated C. Co. v. Seniger,* 179 Ill. 370, 53 N. E. 733; *Giordano v. Brandywine G. Co.* 3 Pennewill (Del.) 423, 52 Atl. 332; *Park v. N. Y. C. & H. R. R. Co.* 155 N. Y. 215, 49 N. E. 674. The case of *Driscoll v. Fall River,* 163 Mass. 105, 39 N. E. 1003, is not in conflict with the rule above stated, as will be observed from reading *Carson v. Canning,* 180 Mass. 461, 463, 62 N. E. 964. We think, under the facts established in this case, the court erred in refusing to receive evidence along the lines above indicated and in striking out a portion of the evidence admitted. What is here said does not run counter to the decisions of this court in *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 216, 99 N. W. 366, and *Kliefoth v. Northwestern I. Co.* 98 Wis. 495, 498, 499, 74 N. W. 356. The fact that employees of the defendant, including Lesch, avoided the careless use of gasoline while the defendant's foremen were around, might be very significant on the question of actual notice, but could not render incompetent the evidence offered as to general repute.

It is further urged that there was sufficient evidence, aside from that offered to show general reputation, to warrant the

jury in finding that the defendant, in the exercise of ordinary care, should have known of the incompetency of the employee Lesch before the accident, and that the jury might likewise have found that the defendant was negligent in failing to discharge him.

Evidence was offered tending to show that, for the period of one year or more that Lesch was employed as a molder before the accident, he had frequently thrown gasoline on fires in the molds; that he had been upbraided once and probably twice by one of the defendant's foremen for so doing; that the foremen were very frequently in the portion of the shop in which Lesch was employed, and many times every day passed by where he was working; and that one of the proprietors, during a very considerable portion of the time, occupied a position where he could observe generally what was going on in the factory; as well as some other facts that were calculated to give notice to the defendant of Lesch's habitual carelessness in the use of so dangerous an element as gasoline. If, in addition to these facts, it be shown that Lesch had a general reputation among those with whom he worked for being habitually careless in using gasoline in the manner stated, we think it was for the jury to say whether, in the exercise of ordinary care, the defendant should not have discovered that Lesch was an incompetent servant and whether the defendant was negligent in failing to discharge him.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

NOVAK, Respondent, vs. NORDBERG MANUFACTURING COMPANY, Appellant.

December 10, 1909—January 11, 1910.

Master and servant: Injury to inexperienced servant: Duty to instruct: Contributory negligence: Instructions to jury: Credibility of witnesses.

1. With no experience, as defendant knew, in machinery save in the operation of an electric traveling crane, and without instruction as to his duties or warning as to the dangers, plaintiff was set to assist the operator of a machine for boring steel in defendant's factory. The power for the machine was turned on or off by moving gear wheels on their shafts, but there was no mechanism for doing this other than a raised rim or bead, not particularly noticeable to an inexperienced person, on the hub of the wheel, which the employee was expected to take hold of with his fingers. Upon evidence tending to show that plaintiff was ordered by the operator to pull off the gears and made an attempt to do so; that he told the operator that he did not know how, and was again ordered to throw them off, but was given no instructions; and that in attempting to do so by taking hold of the circumference of one of the wheels his fingers were caught and crushed in the cogs, it is *held* that it was a question for the jury whether defendant was negligent in failing to give proper instruction or warning as to the danger.
2. The question whether plaintiff was guilty of contributory negligence was also, upon such evidence, for the jury.
3. The jury were properly instructed in such case that the presumption in case of an adult employee is that he has sufficient intelligence to comprehend the dangers of his employment, but where there is ignorance, inexperience, or lack of intelligence on the part of the employee, which is or ought to be known to the master, and which tends to prevent the employee from comprehending the dangers, it is the duty of the master to properly instruct and warn the employee thereof.
4. An instruction, requested by defendant, that if plaintiff did not tell the operator that he did not know how to pull off the gears the verdict must be for the defendant, was properly refused.
5. While it is proper to instruct the jury that in weighing the testimony of a party they should consider his interest, this ought to be done in connection with a general instruction that considerations of interest, appearance, manner, and the like apply to the party in common with all other witnesses; and the jury should not be told that the testimony of a party is looked upon with distrust and suspicion.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Personal injuries. Plaintiff was a young man without education, twenty-three years of age in the spring of 1906. He had worked in various capacities since he was thirteen years of age, first in a brush factory at a foot-power machine, then driving a team, and afterwards for nine months running an electric traveling crane in the shop of the Vilter Manufacturing Company. Then he returned to driving a team, and finally in 1906 he went to work for the defendant corporation in its machine shop. He was on the night gang, and was set to work operating a traveling crane, and continued at that work for several weeks. On the night of July 28, 1906, the foreman told him to go and help one Hagan, who was operating a large machine, in the nature of a lathe, called a "boring bar," and used for the purpose of boring out cylinders for steam engines. He was told to do what Hagan told him to do. He testified that he had not worked on this machine before. He helped to set up the job on the machine, tighten the bolts, etc., and set the machine in motion, after doing which both Hagan and plaintiff sat down till the cut was nearly through.

On one end of the machine are two cogwheels meshing together called the feed gears, the lower one being the larger and weighing about eighteen pounds, and the upper one nine pounds. These wheels move slowly, but the rate of speed is not given. They are about breast high and are on horizontal shafts which project outward from the machine several inches. These gear wheels, when moved forward towards the body of the machine upon their respective shafts, become attached to the shafts by means of a small projection on the shaft over which a corresponding opening in the hub of the wheel easily slips, and when the power is desired to be thrown off they are pulled outward and slip off from the projection to the outer part of the shafts and revolve idly. There is no mechanism to pull off or throw off these gear wheels except that there is a projection or bead around the outside of the outer edge of the

hub of the wheel which the employee is expected to take hold of with his fingers and pull towards himself, thus pulling the wheel itself off from its engagement with the shaft and stopping the application of power. The plaintiff was not shown how to throw off the feed gears by any one and had never seen it done.

When the cut was nearly done, Hagan, who was at the other end of the machine, told plaintiff to go and pull off the feed gear. Plaintiff testified that he went and tried and could not, and told Hagan that he did not know how, and then Hagan told him to go and do it if he wanted to keep his job. This latter fact is denied by Hagan, but it is admitted that Hagan told him to pull off the gear and that he did not tell him how. Plaintiff attempted to pull off the gear by taking hold of the upper part of the circumference of the larger wheel and pulling towards himself. While doing so his right hand was drawn between the gear wheels, and before he could get it out the fingers of his hand (except half of the forefinger) as well as a part of the palm were crushed and destroyed.

The defendant's motion to direct a verdict was denied, and a general verdict for the plaintiff for $6,500 was rendered, and from judgment thereon defendant appeals.

C. H. Van Alstine, for the appellant.

For the respondent there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

WINSLOW, C. J. Upon the general contentions that there was no negligence in failing to instruct, and that there was contributory negligence shown as matter of law, the case is a close one, but we have reached the conclusion that upon both propositions the ruling of the trial court must be sustained.

The plaintiff had no experience in machinery save in the operation of an electric traveling crane, and this was evidently known to his employer. He was set to work to assist the operator of the boring bar without instruction as to his duties or

warning as to the dangers. He was sent to pull off the feed gears without instruction. How rapidly these gears revolved does not appear—presumptively rather slowly, as the machine was boring steel; but in any event it seems that it was not very obvious to an inexperienced person how the operation of "pulling off" the feed was to be performed. The raised rim or bead on the hubs, by which it is said they should be pulled off, was not particularly striking or noticeable, nor do we think it would necessarily occur to an inexperienced employee that this raised projection was made for the purpose of pulling off the gear wheel. Probably it seemed to the trial court, as it impresses us, that this arrangement was rather a crude and singular way of accomplishing the purpose, and that if such an arrangement is used there is certainly room to say that an utterly inexperienced employee is entitled to instruction when he is required to pull off the gears, and that a failure to instruct may be negligence.

Upon the claim of contributory negligence it is said that in placing his hands on the outer edge of the lower cogwheel while it was in motion he was plainly doing what no man of any degree of intelligence would do without foreseeing the probable injury, and that even a child would foresee the danger. Doubtless he knew that if his fingers went between the cogwheels they would be crushed; but must it be said as matter of law that he, with his known lack of experience, was bound to know and appreciate the danger of his hand being drawn between the cogs when he took hold of the wheel? *Chopin v. Badger P. Co.* 83 Wis. 192, 53 N. W. 452; *Wankowski v. Crivitz P. & P. Co.* 137 Wis. 123, 118 N. W. 643. We think not. The jury were entitled to believe that when he was first sent to throw off the gears he came back to Hagan and told him he did not know how to do it, and that Hagan again, without instruction, told him to throw them off, with a threat of discharge if he did not do so. Was he not then entitled to believe, or would he not naturally infer, that the gears must

move very easily, and that a mere touch would accomplish the purpose? As said before, the inference is that the wheels were moving slowly. Now, if he inferred that the pulling off must be very easy, and he saw nothing in the way of a contrivance or apparatus by which he could do so, what more natural than to suppose that, in view of the slow motion, there would be little if any risk of injury in grasping the wheel itself, on the assumption that it must be so arranged as to at once yield to a trifling pull?

In view of his known inexperience, his entire lack of instruction, his being sent back after telling his immediate superior that he did not know how, and the rather obscure method by which it was expected the task would be performed, we do not feel that it can be said as matter of law that the plaintiff was guilty of contributory negligence in taking hold of the wheel.

An instruction was requested and refused to the effect that the plaintiff was interested in the result of the trial "to such an extent that testimony given by him in person in his own favor is in the law looked upon with distrust and suspicion, and you must carefully scan and weigh it to the end that it be given no more than its just and true weight." The refusal is alleged to be erroneous, but it is plainly not so. It is not the law of this state, if indeed it be the law in any jurisdiction, that the evidence of a party is looked upon with distrust and suspicion. On the contrary, this court has frequently held that while it is proper to call the attention of the jury to the interest of a party in weighing his testimony, still that should be done in connection with a general instruction that considerations of interest, appearance, manner, etc., apply to the party in common with all other witnesses. *Schutz v. State,* 125 Wis. 452, 104 N. W. 90; *Anderson v. State,* 133 Wis. 601, 114 N. W. 112; *Kavanaugh v. Wausau,* 120 Wis. 611, 98 N. W. 550. In the present case the court gave a general instruction to the effect that in considering the weight of his testimony the plaintiff's interest should be considered and a like

test applied to any other interested witness. This covered the subject.

The court charged the jury in effect that the presumption in case of an adult employee is that he has sufficient intelligence to comprehend the dangers of his employment, but that if there is ignorance, inexperience, or lack of intelligence on the part of the employee, which is or ought to be known to the master, and which tends to prevent the employee from comprehending the dangers of his employment, it is the duty of the master to properly instruct and warn the employee of the dangers to be apprehended. It is not claimed that this is an incorrect abstract statement, but it is claimed that there is nothing in the evidence tending to show that the plaintiff was not a man of ordinary intelligence and hence the instruction was erroneous in this case. Certainly there is ample evidence of the fact of general ignorance and inexperience and ample evidence that the employer ought to have known of them. As to lack of ordinary intelligence, it seems clear that, if (as the jury were entitled to find) the plaintiff returned to Hagan and told him he did not know how to throw off the gears, there was a concrete fact which should have raised in Hagan's mind a serious question as to the plaintiff's intelligence. Appellant contends that this fact could only tend to show inattention or want of thought. But inattention or want of thought often springs from lack of intelligence; and it would seem that if inattention or want of thought *was* suggested by the act, then all the ordinary and usual causes of inattention or want of thought should have been suggested also.

Finally, it is contended that instructions should have been given to the effect that if plaintiff did not tell Hagan that he did not know how to pull off the feed gear the verdict must be for the defendant. This would hang the whole case on this one disputed fact, which we think would not have been correct.

By the Court.—Judgment affirmed.

KERWIN, J., dissents.

PUFFER and others, Respondents, vs. WELCH and others, imp., Appellants.

December 10, 1909—January 11, 1910.

Appealable order: Discontinuance of action.

1. An order discontinuing an action on plaintiff's motion, and denying defendant's motion for judgment on the merits, is not appealable under subd. 1, sec. 3069, Stats. (1898). Although it practically terminates the action as to plaintiff, it does not prevent a judgment from which an appeal might be taken, on which appeal such order might be fully reviewed.
2. The right of appeal is purely statutory, and where the right is not given the court cannot entertain an appeal, even though a refusal to do so may seem to rest upon a technicality.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Appeal dismissed.*

Action to recover damages for fraudulently inducing the making of an option contract between the defendant *White Rock Mineral Spring Company* and its stockholders, particularly the defendant *Welch,* on one side, and persons named as defendants on the other, for the sale by the former to the latter of the property of such corporation. Plaintiffs, by purchase, became owners in severalty of a three-sevenths interest in the contract. They claimed that *Welch* and the corporation misrepresented material matters on the faith of which the contract was made and, for value, came in part to them to their damage which they sought to recover.

Those charged as liable to respond in damages answered, among other things, to the effect that all claims under the alleged option contract, long prior to the commencement of the action, were adjusted, settled, and discharged as part consideration for a second option contract.

After trial of the cause had progressed to a considerable extent, an adjournment was granted, on motion of plaintiffs' at-

torneys, for a brief period. Upon its being again taken up, one of plaintiffs' attorneys announced that he was satisfied, from his investigation, that the second contract, mentioned in the answers, was given and taken as claimed; that it precluded any recovery of damages on the first contract, and, therefore, that he would move the court for leave to discontinue. A motion was then made, or regarded as pending, for judgment in favor of the answering defendants, on the pleadings. The motion for leave to discontinue was granted. Subsequently a formal order was entered discontinuing the action with costs and denying defendants' motion. Later the costs were paid and the money retained. After such payment this appeal was taken.

For the appellants there were briefs by *Harrison S. Green,* attorney, and *Rossiter Lines,* of counsel, and oral argument by *Mr. Green.*

For the respondents the cause was submitted on the brief of *Gill, Barry & Mahoney.*

MARSHALL, J. While it is true that an order discontinuing an action, practically puts an end thereto as regards the plaintiff (*Juneau Co. v. Hooker,* 67 Wis. 322, 30 N. W. 357), yet it is doubtless competent for either side to have the litigation closed by a proper judgment, and it might have to be so closed in order to enable the defendant to enforce his right to costs.

So it is quite clear that, not only is it proper to enter a judgment of discontinuance, following an order granting a motion in that regard, but an appeal from such a judgment would carry therewith to this court for review such an order as the one in question both as regards the granting of the discontinuance and denial of the motion for judgment in defendant's favor on the merits.

It cannot be well said, then, that the order terminated the action, and prevented a judgment from which an appeal could

be taken, and, as such, is appealable. True, it terminated the action, leaving nothing to be done for defendant's protection, unless he needed a judgment to enable him to collect his costs, which he did not, since they were voluntarily paid, but it did not, in the words of the appeal statute, "prevent a judgment from which an appeal might be taken" presenting the questions sought to be raised on appeal from the order. Therefore, the order was not appealable.

It may look quite technical to so rule here that the appeal must fail because appellant did not go through the somewhat empty formality, under the circumstances, of entering a judgment, so as to have that finality to appeal from. But, as in many situations liable to arise, whether the turning point appears technical or not depends upon the viewpoint and upon where the responsibility lies.

It must be remembered that the right of appeal is purely statutory. If the legislature has phrased the right so that, in some instances, it must be denied upon somewhat trifling considerations, there is no help for it. Whatever of technicality there is under such circumstances is in the law, not in its administration.

The court cannot grant a right which is wholly within the field of lawmaking power to grant or refuse, because the refusal to entertain an appeal may have the appearance of tying to a technicality. The legislature saw fit to provide that an order in an action, except certain classes with which the one in question has no similarity, shall not be appealable unless it prevents the entry of a judgment. It was perfectly competent to so provide. The general policy thereof was doubtless wise, notwithstanding in an instance now and then, like the present one, it might be said to dignify mere formality as matter of substance. In any event, the duty of the court is to administer with fidelity the written law. That requires a dismissal of this appeal.

By the Court.—The appeal is dismissed.

ESTATE OF SCHEFTELS: CITIZENS TRUST COMPANY, Appellant, vs. SCHEFTELS, Respondent.

December 10, 1909—January 11, 1910.

Executors and administrators: Payment of claims: Appeal from county court: Affirmance on motion: Harmless errors.

1. Where a claim against an estate was allowed in the county court and the time for filing claims had expired and money was in the executor's hands in excess of all claims, the executor was bound to pay such claim, and was not excused from doing so by the fact that, before the time for filing claims had expired, he had paid to legatees all moneys in his hands to an amount in excess of the claims filed, without an order of court but with his co-executor's consent.
2. On appeal to the circuit court from an order of the county court commanding an executor to pay an allowed claim, the claimant procured an order to show cause, based on facts stated in the appellant's answer, why the order should not be affirmed. The order to show cause was required to be served at least twenty-four hours before hearing, but was served five days theretofore. On the return day the executor objected that the action should be placed on the calendar for trial, but this objection was overruled and judgment entered affirming the order of the county court. *Held*, that as this judgment was correct on the merits any technical errors in the summary procedure were not ground of reversal, in view of sec. 2829, Stats. (1898), and sec. 3072*m*, Stats. (Laws of 1909, ch. 192, sec. 1).

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

One *Flora E. Scheftels* having presented and procured the allowance of a claim for $2,560, and the time for filing claims having expired, and only one other small claim having been allowed, and the inventory showing personal property in the hands of the executor far in excess of said claims, said *Flora* made petition to the county judge showing such facts in detail and praying that the executors be ordered to pay her claim. To this only the appellant, one of the executors, made answer, setting forth as an excuse that it had before the time for filing

claims had expired paid to specific and residuary legatees all moneys in its hands in an amount far in excess of the claims filed, without any order of court, but with consent of the other executor; that certain real estate still remains undisposed of, but of problematical value. Upon this answer, and certain additional affidavits offered by the claimants in contradiction of some of its statements, the county court entered an order that the *Citizens Trust Company,* as executor, forthwith pay said claim with interest and costs. From such order the *Citizens Trust Company* appealed to the circuit court.

After the return from county court had been filed in circuit court, the claimant and respondent in that court procured an order to show cause upon the record why judgment should not be entered affirming the order of the county court. Such order required that it be served at least twenty-four hours before the time set for hearing. It was in fact served some five days before. On the return day formal protest to the hearing of said motion was made on the ground that the action should be placed on the term calendar for trial. The matter was postponed for consideration and said objections were overruled, and on June 2, 1909, an order was entered for the entry of judgment affirming the order of the county court appealed from, which judgment was thereupon duly entered, and from it the *Citizens Trust Company,* as executor, appeals.

For the appellant there was a brief by *Nath. Pereles & Sons,* attorneys, and *Charles S. Carter,* of counsel, and oral argument by *Mr. Carter.*

For the respondent there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

DODGE, J. The answer of appellant stated facts from which a clear duty to pay the petitioner's claim arose. The court merely enforced an admitted duty after due notice and reasonable opportunity for the executor to be heard. No suggestion was made of any desire to amend the answer or change

that admission. Whether or not some technicalities of procedure were ignored in this summary and expeditious disposition of the action is not very material, for the record before us discloses no injustice to the appellant. It is at most required to perform only its legal duty. Such a situation is fully within the letter and the spirit of sec. 2829, Stats. (1898), and sec. 3072*m*, Stats. (Laws of 1909, ch. 192, sec. 1), which forbid us to reverse a judgment in the absence of apparent prejudice.

By the Court.—Judgment affirmed.

McGovern and another, Respondents, vs. Milwaukee Motor Company and others, imp., Appellants.

December 10, 1909—January 11, 1910.

(1) *Appeal: Objections to form of pleading.* (2–4) *Corporations: Insolvency: Sequestration: Judgment: Fraudulent conveyance: Liability of grantees.*

1. Objection to mere matters of form in pleading cannot be made for the first time on appeal.
2. In an action under sec. 3216, Stats. (1898), for sequestration of the property of an insolvent corporation, based on judgment and execution returned unsatisfied, it is an irregularity to render a new judgment against the corporation; but other defendants are not prejudiced thereby.
3. In such an action a judgment might properly be rendered against a fraudulent grantee of the property of the insolvent corporation and against other defendants who assisted in perpetrating the fraud, for the amount of the original judgment; but a judgment granting that relief and also appointing a receiver to pursue the assets of the insolvent corporation can be sustained only by construing the first part thereof as interlocutory and conditional upon the receiver being unable to collect from the assets of the insolvent company, and only for the amount of the deficiency, if any, appearing from his report.

4. Where an insolvent corporation, with intent to defraud a creditor, conveyed all of its assets to another corporation whose officers assisted in perpetrating the fraud, such grantee and its officers cannot avoid payment of the whole claim of the defrauded creditor on the ground that, at the request of the grantor and as consideration for the fraudulent conveyance, they have paid to other creditors of such grantor an amount exceeding the value of the assets received.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Lyman G. Wheeler, for the appellants.

For the respondents there was a brief by *Kronshage, McGovern, Goff, Fritz & Hannan,* and oral argument by *Arthur F. Belitz.* They cited, among other cases, *Dousman v. Milwaukee,* 1 Pin. 81; *Ford v. Plankinton Bank,* 87 Wis. 363, 58 N. W. 766; *Slack v. N. W. Nat. Bank,* 103 Wis. 57, 79 N. W. 51; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909; *Collins v. C., St. P. & F. du L. R. Co.* 14 Wis. 492; *Adler v. Milwaukee P. B. Mfg. Co.* 13 Wis. 57; *Marvin v. Anderson,* 111 Wis. 387, 87 N. W. 226.

TIMLIN, J. The respondents *McGovern* on January 21, 1905, recovered a judgment against the B. & P. Company, a corporation, upon a demand existing and in suit since June, 1903. After execution on this judgment was issued and returned unsatisfied, respondents began a suit under sec. 3216, Stats. (1898). The complaint, in addition, showed many of the features of a creditors' bill, but no objection is or can be made at this stage of the litigation upon any mere matter of form. It appeared from the findings of the court below, supported by evidence and admissions of the pleadings, that on September 22, 1904, during the pendency of said action first mentioned, the defendants *Edgar E. Warner, Arthur W. Warner,* and Frank L. Ford, stockholders, directors, and officers of the B. & P. Company, organized and became shareholders in another corporation called the *Milwaukee Motor Company,*

thereafter took in with them under a pre-existing arrangement one *Hilton B. Warne,* and turned over all the assets of the B. & P. Company to the *Milwaukee Motor Company,* which latter in consideration therefor assumed all the indebtedness of the B. & P. Company except the claim of the respondents. The trial court found this transfer to the new corporation and the organization of the new corporation were for the purpose of hindering, delaying, and defrauding the plaintiffs in respect to their then existing demand against the B. & P. Company. This fraudulent intention and purpose is found as matter of fact, and it is also found that at the time of this transfer the B. & P. Company was insolvent. The value of the assets so transferred exceeded $5,000, and the only consideration paid by the *Milwaukee Motor Company* was the assumption by the latter of all the debts and liabilities of the B. & P. Company except the claim of the plaintiffs then pending in litigation. The defendant *Warne,* who came in later, but shortly after the organization of the corporation, had full knowledge of the intention and purpose of his codefendants to hinder, delay, and defraud the respondents, and with them has the assets of the B. & P. Company. Thereafter the *Milwaukee Motor Company* paid and discharged all the claims of all the creditors of the B. & P. Company except the plaintiffs' claim, and there still remains in the possession of the *Motor Company* and of the other defendants substantially all the assets of the B. & P. Company.

Among other conclusions of law the court found that the defendants the *Warners* and Ford were liable to the plaintiffs to the extent of the value of the assets so converted, transferred, and conveyed, or so much thereof as might be necessary to satisfy the plaintiffs' judgment, interest, and costs; that the equities of the defendant *Warne* in the assets of the *Motor Company* were subsequent, inferior, and subject to the respondents' equities; that the assets of the B. & P. Company so transferred were and are a trust fund in favor of the

plaintiffs so far as necessary to satisfy the plaintiffs' claim; and that the plaintiffs were entitled to judgment against the defendants B. & P. Company, *Milwaukee Motor Company, Edgar E. Warner, Arthur W. Warner,* Frank L. Ford, and *Hilton B. Warne,* and each of them, for the amount of the original judgment, with interest on said amount from the date of such judgment, and the costs and disbursements of this action. The court also concluded that a receiver with the usual powers should be appointed to take charge of the property and effects of the said B. & P. Company and to collect, sue for, and recover the debts and demands that may be due and the property that may belong to the said B. & P. Company so far as might be necessary to satisfy the plaintiffs' judgment and apply the same to the satisfaction of said judgment, and for any deficiency the defendants *Milwaukee Motor Company, Edgar E. Warner, Arthur W. Warner,* Frank L. Ford, and *Hilton B. Warne,* and each of them, should be directly and personally answerable to the plaintiffs. Judgment was entered accordingly.

There are several irregularities in this judgment. The action being one for sequestration of the property of the insolvent B. & P. Company, based on judgment and execution returned unsatisfied, there should have been no new judgment in this action rendered against that company. But the latter has not appealed. The other defendants are not prejudiced by this error. So far as the judgment in this action is rendered against the fraudulent grantee and those aiding and assisting in perpetrating the fraud, that relief alone would be within the power of a court of equity. But it would be irregular to grant this relief and also appoint a receiver and authorize him to pursue the assets of the insolvent company *pari passu.* We are able to sustain this judgment in this respect only by construing it to mean that the judgment against the other defendants is interlocutory and conditional upon the receiver being unable to collect from the assets of the B. & P.

Company and only to the amount of the deficiency, if any, which may appear from the final report of the receiver. It is therefore within the power of a court of equity, which may mold its remedies to suit the exigencies of the case.

The principal contention on this appeal is, however, that the *Motor Company* having received only $5,000 in value of assets of the B. & P. Company, and having discharged, in consideration of such transfer to it, liabilities of the B. & P. Company amounting to about $13,000, the respondents could in any event recover only from the *Motor Company* and the persons making the transfer respondents' actual damage, which would be their *pro rata* on a distribution of the assets of the B. & P. Company among its creditors, including the plaintiffs, or about five thirteenths of the plaintiffs' claim of $590.04, with interest on said five thirteenths. But here the fraud found by the circuit court is actual, not constructive merely. In such a case the fraudulent grantee and those corporate officers aiding and assisting it in perpetrating the fraud can have no credit or advantage by reason of the advance of part of the purchase money or the discharge of other liabilities existing against the property.

In *Ferguson v. Hillman,* 55 Wis. 181, 12 N. W. 389, the debtor had real estate worth $15,600 and personal property worth $3,500, in all $19,100. His debts exceeded $20,000, and the fraudulent grantee knew that they exceeded $17,000. The latter took warranty deeds of the real estate and two chattel mortgages on the personal property, assumed to pay $9,114.77 of the debts of his grantor, and advanced to his grantor on the chattel mortgages $1,500. The circuit court rendered judgment against the grantee and grantor for $1,413.60 and interest to be collected out of the fraudulent grantee up to the amount of $1,500. It was there decided that the fraudulent grantee could not be protected for the amount actually paid by him at the time of the fraudulent transfer nor in the possession of the proceeds of property

fraudulently transferred to him, which proceeds were received by him on a sale by him of such property. In *Avery v. Johann,* 27 Wis. 246, there was a full consideration paid for the land, but the transfer was made in fraud of creditors and the grantees participated in that fraud. Part of the consideration was the sum of $3,025 due from the grantor to the grantees, and the judgment reserved no right as against the creditors' bill to retain this amount as a lien on the land. In *Mason v. Pierron,* 69 Wis. 585, 34 N. W. 921, both parties to the transfer participated in the fraud. After the conveyance to him the fraudulent grantee mortgaged the premises to a *bona fide* mortgagee for $2,500, and the circuit court rendered a personal judgment against the grantee for the amount of such mortgage, principal and interest. Judgment was affirmed by this court. In *Bank of Commerce v. Fowler,* 93 Wis. 241, 67 N. W. 423, it is ruled that the grantee of nonexempt property colluding with the grantor thereof to hinder and delay creditors of the latter cannot as against such creditors be protected even for the amount actually paid on the purchase. In *First Nat. Bank v. Bertschy,* 52 Wis. 438, 9 N. W. 534, where no actual intent to defraud was shown and the fraud was merely constructive as against creditors, the conveyance was allowed to stand as a security for the sums due from the grantor to the grantee. See, also, *Morley Bros. v. Stringer,* 133 Mich. 690, 95 N. W. 978.

There can be no sound distinction in this respect made between moneys paid by the fraudulent grantee to his grantor and moneys paid by such grantee at the request of the grantor to other creditors of the grantor as the consideration of the fraudulent transfer. The scheme is equally effective in either case to hinder and delay the creditor to defeat whose demand the transfer is made. His right to collect his claim is impaired by the transfer. He must either assume the verity and honesty of all the claims thus discharged or assume the burden of proving their respective amounts or invalidity. He is de-

prived of his opportunity to bid at a sale of the assets, and, in short, he is hindered and delayed by such transfer, and when the parties to such transfer are both engaged in the scheme to defraud him the fraudulent grantee can have no credit for the purchase money thus paid out in discharge of other alleged liabilities of the grantor. There is no certain or satisfactory way of measuring the damages to the creditor in such case by the percentage upon his demand which the whole property of the fraudulent grantor, if ratably distributed among all his creditors, would amount to. To limit recovery to such percentage would encourage and facilitate frauds upon small creditors and give the fraudulent transaction the legal force and effect of an assignment for the benefit of creditors or a bankruptcy proceeding. Fraud has not yet become so respectable. We find no reversible error in the judgment.

By the Court.—Judgment affirmed.

BAUMGARTEN and others, Appellants, vs. COHN, Respondent.

December 10, 1909—January 11, 1910.

Statute of frauds: Oral lease for one year to take effect in future: Validity: Statutes construed.

1. An oral lease of land for one year, to take effect in the future, is valid.
2. Such a lease is not within the terms of sec. 2304, Stats. (1898), which declares void every oral contract for the leasing of lands for a longer period than one year; nor is it governed by sec. 2307, which declares void every oral agreement that by its terms is not to be performed within one year from the making thereof,—the latter section being a part of ch. 105, entitled "Of fraudulent conveyances and contracts *relating to personalty.*"
3. Even though a lease of land for one year be a chattel real and do not convey any interest in real property, it is nevertheless a contract "relating to real estate," within the meaning of the title to ch. 104, Stats. (1898), which includes said sec. 2304.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

C. A. Koeffler, Jr., for the appellants.

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles, Jr.,* of counsel, and oral argument by *J. V. Quarles, Jr.*

BARNES, J. This case involves the question whether a parol lease of a building for a period of one year, to take effect in the future, is valid.

Sec. 2304, Stats. (1898), makes void every parol contract for the leasing of lands for a longer period than one year. This section does not prevent leases being made for a period of one year when the term is to commence at some future date.

Subd. 1, sec. 2307, Stats. (1898), makes every agreement void that by its terms is not to be performed within one year from the making thereof, unless embodied in some written note or memorandum, which must express the consideration and be subscribed by the party charged. If this provision is applicable to a parol lease, then the lease involved in this action is void. *Chase v. Hinkley,* 126 Wis. 75, 105 N. W. 230; *Draheim v. Evison,* 112 Wis. 27, 87 N. W. 795; *Conway v. Mitchell,* 97 Wis. 290, 298, 72 N. W. 752, and cases cited.

The statutes of frauds in most, if not all, of the American states are based on Stat. 29 Car. II, which was entitled "An act for prevention of frauds and perjuries." By sec. 1 of that act it was provided that all leases not in writing should have the effect of leases at will only. Sec. 2 created an exception in favor of certain parol leases for a term not exceeding three years from the making thereof. Sec. 4 contained substantially the same provisions that are found in sec. 2307 of our statutes.

It is clear that, under the express terms of the statute referred to, a parol lease for a period of three years to take effect

in the future would be void. However, leases in parol for a term of three years from the date upon which they were made were held valid notwithstanding the subsequent provision in the statute declaring that no action should be brought on any parol agreement that was not to be performed within one year from the making thereof. It is evident, therefore, that the provision last referred to was not regarded as having any application to parol leases. *Rawlins v. Turner,* 1 Raym. 736; *Ryley v. Hicks,* 1 Strange, 651; *Tress v. Savage,* 4 E. & B. 36; *Inman v. Stamp,* 1 Starkie, 12. In the latter case it was held that part performance would take an invalid verbal lease out of the statute.

The decisions of the courts of this country are far from being harmonious on the subject. By many of the state statutes parol leases for a longer period than one year are declared void. In other respects the statutes are, for the purposes of this case, substantially similar to the English statute. In some of the states the two provisions referred to are found in a single section or chapter of the statutes. Such chapters are usually headed or entitled "Frauds and Perjuries," "Frauds," "Prevention of Frauds and Perjuries," or "Contracts." In most of the states where the provisions are so found, it is held that a parol lease for a period of one year, to take effect in the future, is void; the courts taking the view that a lease, like any other contract, in order to be valid must be capable of performance within a period of one year from the time it is made. It is so held in *Wolf v. Dozer,* 22 Kan. 436; *Johnson v. Albertson,* 51 Minn. 333, 335, 53 N. W. 642; *Roberts v. Tennell,* 3 T. B. Mon. 247; *Briar v. Robertson,* 19 Mo. App. 66; *Wheeler v. Frankenthal,* 78 Ill. 124; *Comstock v. Ward,* 22 Ill. 248; *White v. Holland,* 17 Oreg. 3, 3 Pac. 573. Owing either to differences in statutes involved or in facts presented, the cases which respondent cites from Nebraska, Pennsylvania, Connecticut, and Washington have no bearing on the point before us for consideration. Some reliance is placed by

respondent on the case of *Delano v. Montague,* 4 Cush. 42. We are unable to find any statute of Massachusetts existing at the time this case was decided which at all corresponds with our sec. 2304 in so far as it deals with parol leases. There was no exception in favor of such leases in the Massachusetts statute when *Delano v. Montague* was decided.

Ch. 7 of part II, R. S. 1829, of the state of New York (vol. 2), was entitled "Of fraudulent conveyances and contracts, relative to real and personal property." The matters covered by the chapter were placed under three distinct titles. Title I was headed "Of fraudulent conveyances and contracts, relative to lands." Its provisions are substantially the same as those found in ch. 104 of our statutes. Title II was headed "Of fraudulent conveyances and contracts, relative to goods, chattels, and things in action." Subd. 1 of sec. 2 under this title made every agreement void that by its terms was not to be performed within one year from the making thereof. Title III was headed "General provisions," and treated of contracts relating to both species of property.

The New York court of appeals has uniformly held that the provision of subd. 1, sec. 2, tit. II, ch. 7, part II (1st ed.) R. S. 1829, rendering parol contracts void which by their terms are not to be performed within one year, had no application to parol leases, and that a verbal lease for a period of one year, to take effect in the future, was valid on the ground that the statutory provision did not apply or extend to contracts pertaining to real estate. *Young v. Dake,* 5 N. Y. 463; *Trull v. Granger,* 8 N. Y. 115; *Becar v. Flues,* 64 N. Y. 518; *Ward v. Hasbrouck,* 169 N. Y. 407, 419, 62 N. E. 434. Under a substantially like arrangement of similar statutory provisions, the states of Michigan and Indiana have followed the New York rule. *Whiting v. Ohlert,* 52 Mich. 462, 18 N. W. 219; *Waldo v. Jacobs,* 152 Mich. 425, 430, 431, 116 N. W. 371; *Hand v. Osgood,* 107 Mich. 55, 56, 64 N. W. 867; *Huffman v. Starks,* 31 Ind. 474. And in Iowa and Colorado, where the two statutory provisions are found under a common heading in a sin-

gle chapter, it is held that a parol lease for a term of one year, to commence at a future date, is valid. *Sobey v. Brisbee,* 20 Iowa, 105; *Jones v. Marcy,* 49 Iowa, 188; *Sears v. Smith,* 3 Colo. 287, 290, 291. In a case in which the question was not directly involved this court said: "It has been held that a parol lease of lands for the term of one year, to commence at a period subsequent to the day when the contract is made, is valid." *Brown v. Kayser,* 60 Wis. 1, 12, 18 N. W. 523, 527. The New York and Michigan decisions are cited in support of the proposition.

Our statute of frauds is modeled after that of New York. Ch. 104, Stats. (1898), in which sec. 2304 is found, is entitled "Of fraudulent conveyances and contracts relating to real estate." Ch. 105, which embodies sec. 2307, is entitled "Of fraudulent conveyances and contracts relating to personalty." And ch. 106 treats "Of general provisions relating to fraudulent conveyances and contracts."

The title to a chapter of our statutes is not ordinarily a safe guide to follow in interpreting the meaning or scope of a statute found thereunder. *Pulis v. Dearing,* 7 Wis. 221; *Mundt v. S. & F. du L. R. Co.* 31 Wis. 451. But the division and classification of the provisions found in the English statute of frauds, which have been made in New York and in our own state, are strongly suggestive of a legislative intent not to extend the application of subd. 1 of sec. 2307 to parol leases. The New York cases cited were not decided until after our statute of frauds was enacted, so it cannot be said that when we adopted the statute we adopted the construction placed thereon by the decisions cited. But, New York having made the original departure in its compilation, the decisions of its courts in determining the effect of such departure are entitled to great weight, and this court in *Brown v. Kayser, supra,* impliedly at least, expresses approbation of such decisions. It would seem to be reasonably clear that, when our legislature excepted from the operation of the statute leases made for a period of one year, it meant just what it said. One year is a very usual

period for leases to run. Possession thereunder is rarely contemporaneous with the agreement itself. To say that such a lease may not take effect in the future is almost equivalent to saying that parol leases for one year cannot be made, because the instances are rare when the lessee does or can take immediate possession. The provision of sec. 2307 under discussion is of the most general character. It is found in a chapter which, as before stated, purports to deal only with contracts relating to personalty. A parol lease for a period of one year is aptly and specifically provided for in a chapter dealing with contracts pertaining to real estate, and without any attempt to limit the operation of the statute to leases that are to be performed within one year from the date upon which they are made. The authorities, with the possible exception of the Oregon court, as far as we have been able to discover, are unanimous in holding that under such an arrangement of the two provisions as is found in our statutes that contained in sec. 2307 has no application to a parol lease, and the logic of the situation would seem to demand that this court adhere to what was said in *Brown v. Kayser, supra,* and approve of the decisions of the state which we have used as a model in arranging the statutory provisions in question.

It was suggested on the oral argument that a lease for a term of one year is a chattel real (sec. 2029, Stats. 1898), and that the contract in question did not convey any interest in real estate and should therefore be treated as one relating to personalty (subd. 3, sec. 4972, Stats. 1898). The position is not tenable. The contract relates to real estate, and ch. 104, Stats. (1898), deals with such contracts whether they actually convey an interest in real property or not. Sec. 2304, Stats. (1898), specifically covers contracts for leasing or selling any lands or any interest therein.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

BERGER, Respondent, vs. ABEL & BACH COMPANY, Appellant.

December 11, 1909—January 11, 1910.

Master and servant: Injury from defective or dangerous machinery: Contributory negligence: Knowledge of danger: Duty of master to give warning: Special verdict: Duplicity in questions: Appeal: Harmless errors: Evidence: Expert testimony: Admissions: Damages.

1. In an action for injuries to an employee caused by a machine alleged to have been defective, it having been shown that the machine was liable to make a dangerous motion, like that which caused the injury, if the power was thrown off prematurely, there was no error in permitting plaintiff to attempt to prove by expert testimony that appliances to prevent such motion could have been attached, and hence that such condition of the machine constituted a defect.
2. Nor was it error, as against defendant, to strike out such testimony at his request.
3. An employee whose hand was caught and crushed, while he was performing a proper act in the course of his duty, by reason of a secret danger in the operation of the machine at which he was working, was not guilty of contributory negligence if he neither knew nor, in the exercise of ordinary care, ought to have known of such danger.
4. The question being whether the employer ought to have known that an employee set to work at a machine was ignorant of a secret danger in the operation thereof, if the facts were insufficient to charge the employee, in the exercise of ordinary care, with knowledge, it seems that the employer, knowing what the facts were, ought to be charged with knowledge of that insufficiency, especially where he also knew that the employee had never worked at such a machine.
5. A question in a special verdict asking whether a party knew, or in the exercise of ordinary care ought to have known, a certain fact, is erroneous in form, but if answered in the negative the duplicity becomes immaterial; and even when the answer is affirmative, if the evidence did not tend to show actual knowledge but merely that the party ought to have known the fact, the jury may be assumed to have considered only the latter part of the question and it may be held that the form of the question did not affect any substantial right.
6. Where the special verdict as submitted adequately covers the issues, a refusal to submit other questions is not error.

7. A written notice of injury served by plaintiff on defendant under subd. 5, sec. 4222, Stats. (1898), about a month before the action was commenced, was in the nature of an admission deliberately made that the damages did not exceed the sum stated in such notice, and was admissible on the question of the amount of damages, even though the action, in which a larger sum was claimed, was commenced within a year after the injury.
8. An award of $6,502 for an injury to a trunkmaker twenty-four years old, whose hand was so crushed as to necessitate amputation of three fingers, is *held* excessive and reduced to $5,000. WINSLOW, C. J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Modified and affirmed.*

Personal injuries. The plaintiff had his left hand crushed while operating an embossing machine in the defendant's trunk factory June 25, 1906. He was twenty-four years of age at the time. In his complaint he charged that the machine was defective and that he was not warned of the danger when set at work. Both grounds of negligence were put in issue by the answer, and contributory negligence was alleged.

There was little dispute as to the essential facts. The plaintiff had been a hand worker at trunkmaking in Austria, and came to Milwaukee in 1903, and worked first at a tannery, then at a cement block factory, then as carpenter's helper, and then obtained employment at the defendant's factory on the morning of the accident. He was sent at once to operate a machine for embossing leather. This machine is about five feet high and nearly or quite three feet in width. The die faces downward and is stationary. The sheet of leather to be pressed is placed on a large platen or ram plate about two and one-fourth inches below the die, which by the application of steam power is caused to rise up and press the leather against the die. The power is applied by means of a clutch, and the clutch is controlled by a hand lever at the right-hand side of the machine as the operator stands in front of it. To start the machine the operator pulls this lever towards him to the left. This

causes the clutch to operate upon a gear wheel, to which is attached an irregular and heavy cam of three-cornered shape. As the projecting portion of this irregular cam turns upward, a cam roller above it is also forced upward, and this in turn, through a lever and link, moves the ram plate upward against the die. The pressure is thus accomplished by the first half of the revolution of the cam gear. As the last half of the revolution commences, the projecting portion of the cam turns downward, and the cam roller sinks and allows the ram plate to descend to its normal position. If the power is left on, this operation is repeated about every four seconds regularly. In order, however, to stop the press after the operation, the hand lever is thrust to the right and the clutch removed. The proper time to do this is when the ram plate has reached its lowest point, because at this time the heavy, irregular, projecting portion of the cam is also at its lowest point and will not oscillate back and forth, or will only slightly oscillate. If, however, the lever be thrown and the power be taken off just as the ram plate leaves the die, the great weight of the cam will cause it to suddenly drop, and it will oscillate back and forth several times like a pendulum, and in response to this oscillation the ram plate will jump, going back almost or quite to the die the first time, and making two or three more, lesser, jumps. The same effect follows, but in a less degree, if the power be thrown when the ram is half way down. The cam and its mechanism are not visible from the front of the machine. The proper way to operate it is to place the wet leather on the ram plate (which is some two feet square) and then pull the lever, and when the revolution is complete thrust back the lever. When operated in this way there is no second return of the ram plate, and the hand may then be inserted to remove the stamped leather and put in another sheet, when the lever may be again pulled and the operation repeated. When thus operated there is a slight motion or "floating" of the ram plate after it returns to its lowest point and the power is re-

moved, caused by the slight oscillation of the cam which takes place.

An employee named Schrubbe was sent to show the plaintiff how to operate the machine. Leather gussets were being stamped, and Schrubbe operated the machine for half an hour or more, and told the plaintiff to watch and see how he did it. Neither he nor any one else told plaintiff of the effect which would follow if the lever was thrown before the ram plate had fully descended, but Schrubbe undoubtedly always threw it at the right time. After this plaintiff worked successfully for half an hour or so in the forenoon, and in the afternoon continued to work on the machine (no one else being with him, as it was supposed he knew how); and after working an hour or so his hand was crushed by a return motion of the ram plate, while he was reaching in and attempting to remove the leather after it was embossed. Amputation of all the fingers became necessary, except the index finger and thumb.

A special verdict was returned by which the jury found: (1) The plaintiff was injured by getting his left hand crushed between the die and the ram plate; (2) when the power was shut off before the plate had fully descended the plate was liable to go upward of its own momentum so close to the die as to become dangerous to an employee performing the work plaintiff was doing; (3) the defendant, before the accident, knew that such action of the machine was liable to occur and increase the ordinary hazards of operation of the machine; (4) the plaintiff did not know, nor ought he in the exercise of ordinary care to have known, that such action of the machine was liable to occur if the power was shut off before the ram had descended; (5) the defendant knew or ought to have known that plaintiff was unacquainted with such action of the machine and the enhanced hazard thereby resulting; (6) the defendant did not sufficiently instruct the plaintiff so that he should, in the exercise of ordinary care, have known or appreciated the enhanced hazard; (7) the omission to so instruct

was the proximate cause of the injury; and (8) the plaintiff's damages were $6,502. From judgment on the verdict for the plaintiff the defendant appeals.

For the appellant there were briefs by *Boden & Beuscher,* and oral argument by *F. X. Boden.*

For the respondent there was a brief signed by *Kronshage, McGovern & Fritz,* attorneys, and *Arthur F. Belitz,* of counsel, and oral argument by *Mr. O. M. Fritz* and *Mr. Belitz.*

WINSLOW, C. J. Very many errors are assigned, but only those deemed material will be discussed, and some of them only in a general way.

The plaintiff's complaint charged that the embossing machine was defective, and much expert evidence was introduced tending to show that there were appliances which could be attached to such a machine which would prevent the oscillation of the cam when the power was thrown off before the cam had fully descended. At the close of the plaintiff's case, however, the trial court held that there was really no defect in the machine; that it was constructed as was intended; that the only ground for a claim of negligence was in the failure to instruct concerning the proper time to throw the power off; and struck out all of the expert testimony concerning the possibility of the attachment of appliances to prevent oscillation of the cam. There was no error in permitting the plaintiff in good faith to attempt to prove that this condition of the machine constituted a defect, and there was certainly no error in striking out the testimony which had been introduced in this attempt and instructing the jury that it was to be disregarded. In fact this was done at the defendant's request.

It was proven absolutely without dispute that the machine in question was a machine liable to make a dangerous motion when the lever was thrown just as the plate was about to descend. If the lever was thrown as the cam reached the bottom of its course there was no danger, and the hand might

freely be inserted (as it had to be) to remove the stamped leather; but if the lever was thrown a second or two earlier, the ram plate would reascend with great force almost or quite to the die. It is also undisputed that the mechanism of the cam and ram plate is not visible from the front of the machine where plaintiff stood; that the plaintiff was inexperienced with such machines, and that he told the defendant's superintendent so before he was set at work; that while he was shown how to operate the machine by practical illustration by another operative, he was never told in words when was the proper time to pull the lever, nor what the result would be if it was pulled at the wrong time, but left to gather these facts from watching the operation. In addition to these palpably undisputed facts the court below held, after the close of the plaintiff's case, that the accident could have happened in no way except by the plaintiff's prematurely throwing the lever, and our consideration of the evidence leads us to the same result.

So we start with these facts: The plaintiff was inexperienced and defendant knew it; he was set at work before a machine in whose operation there was a secret danger of which defendant knew; he did not have actual knowledge of this danger nor was he told of it, but was required to watch the correct operation of the machine by another, and his hand was in fact caught and crushed by reason of this secret danger while he was engaged in a perfectly proper act. Really the only questions left were whether his instruction was sufficient so that he knew or ought to have known of the secret danger when he prematurely threw off the power, and, if not, whether the defendant ought to have known that he was unacquainted with the secret danger; and finally, whether the failure to instruct was the proximate cause of the accident.

The first of these questions was answered in the negative by the jury. They found that he neither knew nor ought to have known of the danger resulting from premature throwing off of the power. True, the question was double, and if answered

in the affirmative might be subject to criticism; but being answered in the negative, every juryman must have found, both that he did not know and that he ought not to have known, before it could be so answered. This covered the whole question of contributory negligence. It was the plaintiff's duty to put his hand under the die and remove the leather after the ram plate had descended. Consequently his hand was there in the course of his duty, and under no circumstances would it have been hurt except for the secret danger, so he could only be negligent because he put his hand there when he either knew, or ought in the exercise of ordinary care to have known, of the danger. Both these facts being negatived, no ground of contributory negligence is left.

The jury also found that the omission to instruct was the proximate cause of the injury, and thus the only material question left (other than the amount of damages) was whether the defendant ought to have known that plaintiff was ignorant of the secret danger and the enhanced hazard resulting therefrom. The question, as put to the jury, was, "Did the defendant know, or ought it in the exercise of ordinary care to have known," etc., and was answered "Yes." The form of the question is erroneous under the rule laid down in a number of cases. *Lowe v. Ring,* 123 Wis. 370, 101 N. W. 698; *Du Cate v. Brighton,* 133 Wis. 628, 114 N. W. 103; *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809. While this is true, it does not necessarily follow that the judgment must be reversed. It must affirmatively *appear,* after an examination of the entire record, that the error has affected the substantial rights of the party complaining before there can be a reversal. Sec. 3072*m,* Stats. (Laws of 1909, ch. 192). Does it so appear? We think not. There was absolutely no testimony in the case showing that defendant had positive knowledge of plaintiff's ignorance of the danger. The only question was whether the defendant *ought* to have known of such ignorance from the facts before it. The jury, as sensible

men, must have considered simply this latter question, which was the only question upon which there was any evidence. It was not a case like *Du Cate v. Brighton,* where there was evidence from which the jury might have found either fact. There being only one branch of the question upon which there was any evidence or claim of evidence to justify an affirmative answer, we are inclined to hold that it does not affirmatively appear that the form of the question has in any way affected the defendant's substantial right.

We reach this conclusion more readily because the jury had already found, in answer to the next preceding question, that the facts were not sufficient to charge the plaintiff, in the exercise of ordinary care, with knowledge of the danger resulting from premature throwing of the lever. Now the defendant knew what the facts were, and if they were not sufficient to charge the plaintiff with knowledge, it seems that the defendant ought to be charged with knowledge of that insufficiency, and the more so as the defendant had actual knowledge that the plaintiff had never worked on such a machine.

A large number of questions were proposed by the defendant as proper to be inserted in the special verdict, but they were refused, and exception has been taken to each refusal; but, as the special verdict submitted by the court covered the issues as fully as necessary, there is no error in such refusals. We have found no errors either in the charge or in the refusals to charge. The case seems to have been impartially tried and fairly submitted to the jury, and the error in the form of the question before noted is not thought to have impaired any substantial right under the circumstances here present.

The plaintiff before action served a written notice of injury on the defendant, under subd. 5, sec. 4222, Stats. (1898), in which he fixed his damages at $5,000. As the action was commenced and the complaint served within one year after the injury the plaintiff did not introduce the notice in evidence. The defendant, however, offered it in evidence and it was

ruled out as immaterial and irrelevant. There is but one question upon which the notice can be considered material, and that is the question as to the amount of damages. He sued for $7,200 damages. The notice shows that just about one month earlier he had fixed his damages at $5,000. This was in the nature of an admission quite deliberately made, and admissible on the question of the amount of his damages, and the opinion of the court (in which the writer does not share) is that the amount of damages allowed by the jury is excessive, and that the judgment should be modified so as to place the damages at the amount fixed by plaintiff himself in his notice.

By the Court.—Judgment modified by reducing the same as of its date to $5,000, and as so modified affirmed; appellant to recover costs in this court.

BLODGETT, by guardian *ad litem*, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

December 11, 1909—January 11, 1910.

Street railways: Injury to person on track: Contributory negligence: Directing verdict.

In an action for damages on account of actionable negligence, which is not within the class provided for by sec. 1816, Stats. (Laws of 1907, ch. 254), if the evidence discloses contributory negligence on the part of the plaintiff as a matter of law, a nonsuit should be granted or verdict of no cause of action directed in favor of the defendant, subject to the right of the plaintiff to discontinue upon seasonable application therefor.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action to recover for a personal injury.

Plaintiff's claim was that on a dark night she approached

the defendant's double track interurban railway, one track being for east-bound and one for west-bound cars, to take, and on the proper side for taking, an east-bound car, at a customary place for receiving and discharging passengers, the roadbed and the land adjacent having been leveled and somewhat raised for convenience of patrons of the company. An electric signal light was maintained on a pole, which could be operated by any person desiring to board a car, so that the light would show in the proper direction. On such night the signal light was so out of repair as to be useless. When plaintiff saw the car approaching, which she desired to take, she endeavored to give the customary signal for it to stop but was unable to set the light, and while properly yet trying to do so, in the exercise of ordinary care, the car was negligently run against her by reason whereof she was seriously injured.

The negligence claimed to have caused the injury, was failure to have the signal light in proper condition, unreasonable speed of the car under the circumstances, failure to maintain a suitable light at the place for taking on and discharging passengers, to enable them to see their surroundings when circumstanced as plaintiff was, and failure to maintain a proper station at the point where the injury occurred.

Defendant answered admitting that plaintiff was injured, at the time alleged, by one of its cars colliding with her, putting in issue all allegations of negligence on its part, and of due care on plaintiff's part, and as to the extent of the injuries and damages claimed.

The evidence was to this effect: The place where the accident occurred was in the country. The ground had been specially prepared by the defendant by smoothing off and raising it so as to render approach thereto by night as well as by day without difficulty, and alighting and boarding of cars, convenient. Cars were not accustomed to stop, except on signal, which was well known to plaintiff. A suitable method for signaling an approaching car in the nighttime, by electric

light, was provided, which plaintiff was familiar with. The device was out of order without defendant's knowledge.

Plaintiff had never boarded a car at the particular place, but had boarded cars elsewhere on the line where conveniences were similar. She fully understood that the car would run regardless of the station unless signaled. She saw the car coming when some half a mile away and worked the lever properly to set the light and found it to be out of order. She then depended upon signaling by waving her umbrella. The car was well illuminated by inside lights and had a bright headlight. When it was within several hundred feet of plaintiff the lights illuminated the rails on which it was coming so she could see them distinctly all the way thereto from where she stood. When it was yet far enough from her to afford ample time for a step back out of its pathway, she observed, or could have seen, the body of the car distinctly. She nevertheless, as she testified, stood her ground, waving her umbrella, till the car got close upon her. Then she lowered the umbrella and was attempting to close it, still standing, however, in the pathway of the car, till it struck her. The motorman did not know the signal light was out of order, or that any one desired to board the car, till he was within a short distance of the point of collision. He then shut off the power and brought his car to a stand as soon as he could. In the meantime he knew the car had struck some one.

At the close of the evidence, the court, on motion, directed a verdict in favor of defendant. Judgment was entered accordingly.

For the appellant there was a brief by *McCabe & Dahlman*, and oral argument by *Louis Dahlman*.

Clarke M. Rosecrantz, for the respondent.

MARSHALL, J. The only question worthy of mention, for decision on appeal, is, Did the circuit judge rightly rule that the evidence established, as matter of law, fatal contributory

negligence? The foregoing statement leaves very little, if anything, to be said for an opinion in respect thereto. The evidence disclosed about as clear a case of contributory negligence as could well be imagined. To submit such a case to a jury, suggesting thereby that there is room within the range of common sense for a decision either way, thus inviting what might afterwards appear to be a perverse verdict, would be unjudicial. So the trial court properly took the case from the jury upon the ground of plaintiff's clearly established inexcusable fault.

By the Court.—Judgment affirmed.

LOEHR, Appellant, vs. DICKSON, Respondent.

December 11, 1909—January 11, 1910.

(1) *Torts: Lawful acts causing injury: Malicious intent.* (2) *Pleading: Demurrer.* (3–8) *Contracts: Preventing performance: Strict foreclosure of land contract: Breach of duty to receive payment: Damages: Authority of attorney at law.*

1. Lawful acts are not transformed into torts by the fact that inconvenience or pecuniary injury results therefrom to another person, or even by the fact that they were done with malicious intent to injure.
2. Although a complaint, as construed by plaintiff himself, does not state a cause of action, a general demurrer thereto should not be sustained if, liberally construed, it states facts from which any liability results.
3. One who by mutual contract confers on another a right or imposes a duty impliedly agrees not to defeat that right or make impossible the performance of that duty by any affirmative acts of his own.
4. Thus, in a land contract under which the purchaser must pay or tender money to the vendor personally at a certain time, the vendor impliedly agrees that he will do no act which will render such payment or tender impossible; and such contractual duty of the vendor continues with reference to a payment or tender which the purchaser must make, in order to prevent a

forfeiture of his rights, under the terms of a judgment of strict foreclosure of the contract.

5. Breach of such contractual duty by wilful evasion of payment or tender gives rise to a right of action for at least nominal damages; and the purchaser may recover such actual damages necessarily resulting from the breach as were reasonably within the contemplation of the parties at the time the respective contract duties were assumed.

6. Whether payment or tender of the sum named in the strict foreclosure judgment to the vendor's attorney of record, or payment into court, would fix the purchaser's right and prevent the forfeiture, is not determined. Even if payment might be so made, damages might still result from the vendor's breach by reason of the purchaser's inability to get a conveyance of the land at the time of such payment.

7. The fact that upon breach by the vendor of his duty to receive payment the purchaser might apply to the court for relief against the forfeiture and to have some other method for making payment prescribed, would not prevent damage resulting from the breach, since such application could not be made until the time for payment had expired and would then involve delay and expense.

8. Whether profits which would have accrued to the purchaser from a resale negotiated by him, and which were lost by reason of the original vendor's breach of his duty to receive payment and make conveyance, would be recoverable, not determined.

TIMLIN and KERWIN, JJ., dissent in part.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Appeal from order sustaining a general demurrer to plaintiff's complaint, which alleged that defendant is the owner of certain real estate in Waukesha county; that on February 23, 1906, a judgment was entered of strict foreclosure of a land contract which had previously been given by defendant to plaintiff; that such strict foreclosure was subject to the condition that plaintiff pay to defendant on or before August 23, 1906, certain sums of money aggregating on that date approximately $60,000; that plaintiff prior to August 23d, to wit, in the latter part of the month of July, made various attempts to pay said money to the defendant, repeatedly going to his house with the money and sending him letters which he is alleged to

have received, notifying him of the wish to make payment, and that on August 23d a messenger or agent of the plaintiff found defendant and notified him of plaintiff's desire and readiness to make such payment, whereupon defendant appointed an hour on the following day at his attorney's office at which he would be present and would receive the money; that plaintiff attended at that time with the money and defendant did not appear; and that he has been unable to physically tender the payment to him. The plaintiff alleges that the acts of defendant in evading such tender were wilful and with the intention of preventing plaintiff from saving his rights under the land contract and to impose upon him the forfeiture of such rights; further, that on February 24th plaintiff, in reliance upon said judgment, had granted to one Smith an option for the sale of the property involved for $70,000 on or before August 21, 1906, wherein time was of the essence of the contract, and failure by plaintiff to make conveyance on or before August 21st released said Smith; that on said August 21st plaintiff sold and by warranty deed conveyed said property to said Smith in pursuance of said option for $70,000, subject to the condition that, if plaintiff failed to secure proper releases and conveyances from the defendant or his assigns by August 30th, said deed should be void and plaintiff must repay said $70,000; that by reason of defendant's wilful evasion of plaintiff's tender the latter was unable to comply and was obliged to refund, and to lose the profit of said sale, together with certain other opportunities for sale, whereby he suffered damage in the sum of $12,068.76, and certain other amounts, for which plaintiff demands judgment.

The cause was submitted for the appellant on the brief of *Harper & McMynn,* and for the respondent on that of *J. E. Wildish.*

DODGE, J. Plaintiff assures us in advance that his attempt is to state a cause of action in tort. Examining the complaint

in that aspect then: It is at once obvious that none of the acts alleged against defendant is in and of itself prohibited by any law. At most, it is alleged that he did not stay at his home through several days during which plaintiff desired to make tender, or, inferentially, that he went somewhere else; also that he refrained from going to his attorney's office on a certain day promised. Obviously all such acts were entirely lawful in and of themselves. No law prohibited him from leaving home nor commanded his attendance at his attorney's office. If he owed any duty in those respects, it was one imposed by his own promise or contract and not by law. The fact that inconvenience or actual pecuniary injury results to another from such lawful acts does not transform them into torts. It is but a case of damage without legal wrong—*damnum absque injuria*. *Whalon v. Blackburn*, 14 Wis. 432.

But the complaint alleges that these acts, lawful in themselves, were done maliciously—that is, with the express purpose of causing plaintiff damage—and therefore liability results. Very little aid is given by either counsel on this essential question whether a lawful act becomes a tort by reason of malice or intent to injure. Upon this question there is a sharp conflict of authority throughout the courts of the country. The principle is asserted by perhaps the majority of those authorities "that malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful." *Dawson v. Kemper*, 32 Weekly Law Bull. 15; *Jenkins v. Fowler*, 24 Pa. St. 308. A copious collection of authorities on both sides will be found in the note to *Letts v. Kessler*, 40 L. R. A. 177. However, that subject was presented to this court in *Metzger v. Hochrein*, 107 Wis. 267, 83 N. W. 308, under the aspect of a "spite fence" impairing plaintiff's enjoyment of his residence property. The conflicting authorities were carefully considered, and from that conflict this court allied itself with those holding that mere malice or motive to injure could not impose liability for a lawful act.

That case has been treated as final authority for that proposition in *Sullivan v. Collins,* 107 Wis. 291, 83 N. W. 310; *Marshfield L. & L. Co. v. John Week L. Co.* 108 Wis. 268, 274, 84 N. W. 434; *Huber v. Merkel,* 117 Wis. 355, 363, 94 N. W. 354. We deem the rule of *Metzger v. Hochrein* now settled in Wisconsin, and that malicious intent to injure cannot transpose a lawful act into a tort, and hence that the complaint fails to state a cause of action *ex delicto.*

2. The conclusion reached in response to plaintiff's own construction of his complaint is, however, not conclusive. A demurrer challenges the sufficiency of the complaint to state any cause of action, and must not be sustained in face of one which does by liberal construction state facts from which any liability results, although not for some or all of the damages sought to be recovered. *Bieri v. Fonger,* 139 Wis. 150, 120 N. W. 862. From the present complaint it clearly appears that defendant was under a contractual duty to the plaintiff none the less because such duty had been declared and defined by the judgment of a court. That contract required defendant to convey to the plaintiff certain land upon payment of certain money within a defined time. It imposed upon the plaintiff a duty to the defendant to make such payment or at least tender to him personally, for the conveyance was to be cotemporaneous, and such cotemporaneousness was doubtless necessary to the raising of the money to be paid. From a contract imposing such duty on the plaintiff there resulted by necessary implication the agreement on defendant's part to do no act which would render such payment or tender impossible. This upon the general principle that he who by mutual contract confers on another a right or imposes a duty impliedly agrees not to defeat that right or make impossible the performance of that duty by any affirmative acts of his own. *Manning v. Galland-Henning P. M. D. Mfg. Co., ante,* p. 199, 124 N. W. 291; *Eliot Nat. Bank v. Beal,* 141 Mass. 566, 569, 6 N. E. 742. By this complaint it is alleged that the acts of

defendant were in fact done for the express purpose of preventing the plaintiff from tendering or paying the money and acquiring his rights, that they were effective to that end, and that damages of various sorts resulted to him. These facts of themselves are sufficient to show a breach of contract and resulting damages, unless indeed it appears by other allegations of the complaint either that damages did not necessarily result from defendant's breach of his contract duty, or that they were not such as were within reasonable contemplation of the parties at the time of making the contract. *Hadley v. Baxendale,* 9 Exch. 341; *Guetzkow v. Andrews,* 92 Wis. 214, 219, 66 N. W. 119; *Lippert v. Saginaw M. Co.* 108 Wis. 512, 84 N. W. 831.

It is contended by respondent that even wilful evasion by defendant of payment or tender could not make the damages alleged unavoidable, for the reason that plaintiff might have tendered directly to the attorney of record in the suit adjudging these contract duties. It does not expressly appear that there was such an attorney accessible to plaintiff; but, apart from that consideration, it might well develop by proof to be offered in support of this complaint that the inability of the attorney to respond to such tender by the delivery of a conveyance rendered that method practically inefficient to protect plaintiff's rights by reason of the necessity of a conveyance of the property cotemporaneously with the payment to enable security for money needing to be borrowed in order to make legal tender. We do not in this connection decide, however, that the general authority of an attorney of record, which is held in some cases to extend to the collection of a debt, and by statute extends to the release of a mere money judgment (sec. 2908, Stats. 1898; *Flanders v. Sherman,* 18 Wis. 575), also extends to the acceptance or refusal of a tender or payment under such a judgment as this. Again, it is suggested, though not argued, that plaintiff might have paid the money into court and fixed his rights. No statute or authority is cited to

support the proposition that one commanded by a judgment to pay money to his adversary can fully satisfy that command by payment to any court officer, sheriff, or clerk, in absence of some further action by the court authorizing such payment or tender upon grounds arising subsequent to the judgment, and we have found none. Further, however, the same considerations might render such a privilege, if it existed, ineffective in avoidance of damages as those we have mentioned in the case of tender to the attorney.

It is also suggested that plaintiff, instead of suffering the loss of his bargain and alleged consequent damage of some $9,000, might have applied to the court to prescribe some means of payment and tender irrespective of defendant's conduct. We have no doubt that when defendant breached his contract a court might, upon a showing of such fact, either on the foot of the existing judgment or in a new suit in equity, have protected plaintiff against the forfeiture, and prescribed some equivalent method for making payment of the purchase price; but the facts upon which to base such an application could not, under the circumstances of this complaint, affirmatively appear until the period for payment expired, and although the complaint alleges that plaintiff had a period of some six or seven days within which the full performance of the judgment on both sides might have saved him from the alleged loss of his bargain, it is a question of fact whether it was then possible to seek and obtain relief from a court so as to avert that loss. In any event, however, the breach of the contract, when completed, gave rise to a right of action for at least nominal damages, and it is apparent that, even if plaintiff might have avoided the larger damages by some court procedure, he could not take that court procedure without expense; so that he must suffer some actual damages in the effort to avoid still more. Of course we do not decide as a matter of law that the lost profits of plaintiff's alleged resale of the land were themselves proper measure of the damages recover-

able upon breach of contract. That question involves doubtful rules of law, and its answer might well depend upon facts provable under the complaint significant upon the contemplation of the parties at the time of the making of their contract. We, however, deem it clear that the complaint does state a breach of contract by the defendant with a showing of some damages unavoidably suffered by the plaintiff as a result, which may appear by proof to have been within the reasonable contemplation of the parties at the time the respective contract duties were assumed.

By the Court.—Order sustaining the demurrer is reversed, and cause remanded for further proceedings according to law.

TIMLIN, J. (*dissenting*). The complaint shows that on February 23, 1906, in a suit for strict foreclosure, a decree *nisi* was given and rendered whereby if the plaintiff herein, defendant in the foreclosure suit, paid to the defendant herein and to defendant's wife, plaintiffs in the foreclosure suit, within six months from notice of entry of said decree, $2,000, the plaintiffs in the foreclosure suit should be required to deed a tract of land therein described to this plaintiff, but in case this plaintiff failed to pay said sum within said time he should convey said tract to the defendant herein. This decree with reference to another piece of property "provided further that if the defendant *Dr. Oscar Loehr* pays to the plaintiffs the sum of $56,664.42 in addition to the $2,000 aforesaid within six months from the notice of entry of judgment, together with the costs and disbursements of this action, with interest on above amounts at the rate of five per cent. per annum to the time of payment, then and in that case all the conditions of said land contract shall be deemed fulfilled, but in default of such payments within said time this judgment shall be absolute." This foreclosure decree also contained a provision divesting *Dr. Loehr* of all right, title, and interest in and to the property affected by the above-quoted paragraphs except as re-

served in these paragraphs. The complaint in the instant case then avers that the defendant *Dickson,* during the latter month or more of this six-months period of redemption, absented himself from his usual place of abode, concealed himself, and kept out of plaintiff's way so that plaintiff, although able and willing to pay and desirous of paying the amounts fixed by such decree, was unable to do so or to make tender thereof, whereby he lost his opportunity for redemption within the time limited, and also lost a sale of the property which he might or could have made within that time. It is averred that this conduct of *Dickson* was wilful and deliberate and with the purpose and intent and design of preventing redemption by plaintiff.

The pleader intended to state a cause of action in tort, and he has stoutly contended before this court that the complaint states such cause of action. But the majority of this court holds that the complaint shows a contract obligation resting upon *Dickson* and a breach thereof by the latter. I concur in the view that the complaint states no cause of action in tort, for it shows no breach by *Dickson* of any duty imposed upon him by law. I think the original contract stipulations which were the subject of the foreclosure suit are merged in the decree there given. No doubt a judgment is for certain purposes considered a contract. But this is a legal fiction referable to certain remedies thereon or necessary to meet the requirements of statutes or constitutions which might otherwise include the contract until judgment was entered thereon and fail to cover it thereafter. Bishop, Contracts, §§ 141, 566; 1 Black, Judgments, §§ 7–11; 17 Am. & Eng. Ency. of Law (2d ed.) 763, 764, and cases cited.

If this decree creates, expressly or by implication, a contract obligation of the kind suggested resting upon *Dickson,* then every decree for specific performance or similar relief creates such contract obligation and may be the basis of an action at law. On the other hand, if we consider the original

contract stipulations to be in force notwithstanding the decree, or if we consider that the decree continues the stipulations in force unmodified, there is no covenant, express or implied, in the original contract that *Dickson* shall be at any particular place or hold himself in readiness to receive this money. It is the duty of the debtor, where no place of payment is fixed, to seek out, find, and pay to his creditor. If a mortgagee leaves the state or changes his place of residence and his whereabouts are unknown to the mortgagor for ten or fifteen years, is he liable at law upon contract for damages if a wrongful or malicious intent be found? In the case at bar I think the only effect of this absence of *Dickson,* whatever his motive, would be to entitle the defendant in the strict foreclosure judgment, upon application to the court, to have the time of payment extended or to pay the money into court. The weakness of the decision I think is that it finds a contract obligation resting upon the defendant where none exists, either expressly or by implication, and finds a breach thereof consisting of lawful and usual acts not by any obligation prohibited.

KERWIN, J. I concur in the foregoing dissenting opinion of Mr. Justice TIMLIN.

ROEHL, Respondent, vs. CITY OF MILWAUKEE, Appellant.

December 11, 1909—January 11, 1910.

(1) *Taxation: Payment under protest.* (2, 3) *Taking of land for highway: Failure to record final resolution: Nullity of proceedings: Statute construed.*

1. Payment of a special assessment under protest, upon refusal of the tax collector to receive other taxes assessed against the same property unless this special tax were also paid, is not a voluntary payment.

2. The provision in sec. 3187*a*, Stats. (1898), relating to proceedings to take land for highways, that a "resolution or order made by any such body, whereby any land shall be taken or affected without an application having been made therefor, shall have no effect and shall not be notice to any subsequent purchaser or incumbrancer unless such resolution or order be recorded," refers to the "final resolution or order . . . giving a full and accurate description of the land affected thereby, and accompanied with a map showing the location thereof," mentioned in the preceding part of the section. Such a proceeding is void, therefore, where the only thing recorded was a resolution of a common council declaring the necessity for the widening of a street.
3. The nullity of the proceedings resulting from failure to record the final resolution or order under sec. 3187*a*, Stats. (1898), is not limited to "subsequent purchasers or incumbrancers."

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

In 1885 the plaintiff became the owner and he has since occupied a parcel of land having a frontage of 132 feet on both Miller and Concordia avenues in the city of *Milwaukee.* In 1901 Island avenue was a public street, thirty feet wide, between Miller and Concordia avenues. Lying between the land of the plaintiff and Island avenue was a strip of land ten feet wide and 629.34 feet long owned by C. E. Walworth. On January 14, 1901, a resolution, approved by the aldermen from the ward, reciting that it was "necessary for the public interest without unnecessary delay to open, widen, and extend Island avenue from Concordia avenue to Miller avenue," and that it would "be necessary to take for the public use certain lands" in the Twenty-first ward, was adopted by the common council. The resolution states that the reason why it was necessary to make the contemplated improvements was that the facilities for water and sewer service and for travel were inadequate and insufficient for the public use. No petition had been filed requesting the improvements, and the common council acted on its own initiative. On February 11, 1901, the city engineer was directed by a resolution "to make and file with the city clerk an accurate survey and plat of the pro-

posed change and improvement and of the lands proposed to be taken therefor, defining separately each parcel, and indicating upon such plat the location of any improvements upon said premises." On March 11, 1901, a resolution was adopted by the common council reciting that the plat and survey had been returned by the city clerk to the common council and directing him to give notice that the city attorney would apply for the selection of a jury to view the premises and to determine whether it was necessary to take them. It was proposed to take the whole of the ten-foot Walworth strip and a strip of plaintiff's land twenty feet wide, running from Miller avenue to Concordia avenue. The notices were given and a jury was selected. They viewed the premises and reported that public necessity required the taking of the lands as proposed. June 17, 1901, a resolution was adopted approving the report of the jury and directing the board of public works within ninety days to view the premises, to assess the benefits and damages caused by taking the lands required, and to make report to the common council.

Under date of October 18, 1901, the board of public works reported that on September 26, 1901, they had viewed the premises and made an assessment of the benefits and damages occasioned by the proposed improvements. The damages to C. E. Walworth were assessed at $800 without any benefits; the damages to the plaintiff were assessed at $1,600 and the benefits at $1,950; other lands were assessed as benefited to the extent of $547.70. Expenses of $97.70 were included in the report as part of the damages which were to be paid as benefits arising out of the improvements. The resolution of January 14, 1901, was filed in the office of the register of deeds. On January 29, 1902, the plaintiff paid the $350, the excess of the benefits over damages to his property caused by the improvement, which was assessed with other taxes in the tax roll against his property. The plaintiff protested against being compelled to pay this amount, but on the refusal of the

collector to receive the other taxes assessed against his land with this sum unless this amount were also paid, he paid this amount under protest.

The complaint asks that the defendant be enjoined from entering upon plaintiff's premises or from doing any work thereon for the purpose of opening Island avenue, that all the proceedings taken by the common council and the board of public works with reference to opening Island avenue be declared void, and that the plaintiff recover back the $350 paid by him.

The court found, in addition to the facts above stated, that the assessment of damages for the taking of the Walworth strip was excessive and that it was not worth more than $200, that the damages assessed to the plaintiff were not adequate, and that the assessment of benefits was excessive. On the grounds that the entire proceedings were illegal and void because of the failure of the defendant to file a plat or map giving a description of the lands proposed to be taken for the proposed improvement, because the assessment was not made within ninety days after the resolution was adopted, as was provided in the resolution, and because of the unfairness of the assessment as regards the plaintiff, the court ordered judgment as prayed for in the complaint. This is an appeal from the judgment.

For the appellant the cause was submitted on the briefs of *John T. Kelly,* city attorney, and *Benjamin Poss,* special assistant city attorney.

F. C. Eschweiler, for the respondent.

SIEBECKER, J. The judgment for the recovery of the amount assessed against the plaintiff as the excess of benefits over the damages awarded in the proceedings is assailed upon the ground that he voluntarily paid it. It appears that plaintiff protested against payment of this sum, but that such payment was demanded as a condition of receiving payment of

other taxes due from him. The plaintiff manifestly understood that the refusal to pay this assessment would, under the condition imposed by the collector, result in a sale of his property for a default in the payment of his taxes. The condition thus confronting him evidently coerced him into the payment of this sum. Under the circumstances it was not a voluntary payment within the rule of *Parcher v. Marathon Co.* 52 Wis. 388, 9 N. W. 23.

The proceedings for the taking of plaintiff's land are assailed as wholly void upon the ground that the city omitted to comply with the provisions of sec. 3187*a*, Stats. (1898). The provisions of this section apply to the proceedings under which the city attempted to take plaintiff's property for the improvement of Island avenue. The resolution of the common council declaring the necessity for the widening of this street is the only proceeding recorded with the register of deeds of the county. This is, however, not sufficient to meet the requirements of the statute. It is to be noted that this resolution fails to comply with the statute in the material particulars that it fails to give a full and accurate description of the land affected thereby and it is not accompanied by a map showing the location thereof. The statute provides that a "resolution . . . made by any such body, whereby any land shall be taken or affected without an application having been made therefor, shall have no effect and shall not be notice to any subsequent purchaser or incumbrancer unless such resolution . . . be recorded." Sec. 3187*a*, Stats. (1898). It was decided in *Svennes v. West Salem,* 114 Wis. 650, 91 N. W. 121, that the requirement "be recorded" meant recorded in the office of the register of deeds. It is evident that the part of the statute just quoted refers back to the part immediately preceding it, and that the reference to a "resolution or order," whereby land shall be taken or affected, embraces the resolutions or orders specified in the preceding sentence, namely, a "final resolution or order." It therefore follows

that unless the final resolution whereby land is to be taken is recorded it will have no effect. No such resolution was recorded in the office of the register of deeds, and under the provisions of the statute the proceedings are of no effect, for the statute renders all proceedings void unless a final resolution, "giving a full and accurate description of the land affected thereby, and accompanied with a map showing the location thereof, be recorded in the office of the register of deeds of the county in which the lands are situated." The failure to comply with this requirement of the statute nullifies the proceedings.

It is argued that the effect of the statute should be limited to "subsequent purchasers or incumbrancers." Such an interpretation would, in our judgment, be contrary to the intent of the legislature and contradict the plain meaning of the act.

Under the circumstances the plaintiff had the right to restrain the city from taking his land, and to recover the sum of money he had been forced to pay the city because of the illegal proceedings.

By the Court.—Judgment affirmed.

HACK, Plaintiff in error, vs. THE STATE, Defendant in error.

December 11, 1909—January 11, 1910.

Appeal and error: Immaterial errors: Criminal law: Summarily overruling plea in abatement: Preliminary examination: Docket entries: Waiver of arraignment and plea: Instructions to jury: Credibility of witnesses.

1. Immaterial errors and inconsequential defects have been and will be disregarded by this court both in civil and criminal cases, under sec. 2829, Stats. (1898), and under sec. 3072*m*, Stats. (Laws of 1909, ch. 192).
2. Where the record transmitted to the circuit court by the examining magistrate showed that there had been a legal preliminary

examination, the summary overruling of a plea in abatement to the effect that there had been no such examination, without requiring issue to be joined on such plea, was not prejudicial, even though irregular.

3. It is not essential that the examining magistrate should enter in his docket a finding that an offense had been committed and that there was probable cause to believe the defendant guilty thereof. It is sufficient if the record shows that defendant was held to bail and gave bail.

4. An entry in the docket of the examining magistrate, that "the court bound the defendant over to the circuit court," sufficiently shows that the defendant was held to bail; and where it appears that a bail bond was given and approved it is immaterial that the amount thereof is not stated in the docket.

5. The right of arraignment and plea is waived by the defendant by his silence when he ought to demand it, in all cases (except capital cases) where he is fully informed as to the charge against him and is not otherwise prejudiced in the trial of the case by the omission of that formality. *Douglass v. State*, 3 Wis. 820, and other cases, overruled. TIMLIN, J., doubts.

6. Where the jury had been expressly charged that they should convict only in case they were convinced beyond a reasonable doubt, a subsequent statement to them that cases are to be decided upon the weight of evidence, not by counting witnesses, and that a single witness may be more satisfying than a half dozen witnesses who contradict him, was not erroneous.

7. Where a witness on one side is contradicted by one on the other side as to the pivotal fact on which the case turns, and there is no possibility that the testimony of either can be the result of a mere mistake, it is not prejudicial error to say to the jury that one or the other has committed perjury, and to suggest that a motive should be found for such perjury. BARNES, J., *dissenting*, is of the opinion that in this case (an action for selling liquor to a minor) an additional charge, given after the jury had reported that they were unable to agree, in which, besides telling them that they should consider the motive, if any, of the complaining witness in making a false charge, the trial judge stated that there was nothing in the evidence to show why the witness should say that the defendant sold the liquor to him, rather than some other saloonkeeper, was argumentative and prejudicially erroneous.

ERROR to review a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The cause was submitted for the plaintiff in error on the

brief of *Orton & Osborn,* and for the defendant in error on that of the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general.

The following opinion was filed January 11, 1910:

WINSLOW, C. J. The plaintiff in error (hereinafter called the defendant) was convicted of selling whisky to a minor of the age of thirteen years, and brings his writ of error to reverse the judgment. The errors alleged will be taken up in their order.

1. A plea in abatement, to the effect that there had been no preliminary examination, was summarily overruled by the court without requiring issue to be joined thereon. This was probably irregular, but it was in no sense prejudicial. *Guenther v. State,* 137 Wis. 183, 118 N. W. 640. The record transmitted by the justice was before the court, and showed that there had been in fact an examination, and the only fault found with it was that the justice did not enter in his docket a finding that an offense had been committed and that there was probable cause to believe the defendant guilty thereof, but simply made this entry: "The court bound the defendant over to the circuit court of Iowa county at its next term." This court has held that all that is necessary is that the justice should hold the defendant to bail or commit him. *State v. Leicham,* 41 Wis. 565. The words "bind over" are somewhat informal, but have a well understood meaning in the law, namely, to require a person to give bail to appear at the trial of a given case. 4 Am. & Eng. Ency. of Law (2d ed.) 574. The only defect, therefore, is that the amount of the bail bond does not appear in the docket entry; but, as it further appears by the return that a bond was approved, there is no doubt that a bond was given which must have satisfied the requirement of the justice, and the fact that the amount is not named in the docket is very immaterial. The record shows that the defendant was held to bail and gave bail, and that is all that the statute requires.

2. By a singular oversight the defendant was not formally arraigned in the circuit court and never pleaded to the information. An information in due form was filed; the jury was called and sworn; witnesses for both the state and the defendant were examined and cross-examined; the jury was charged by the court and rendered its verdict, in all respects as though issue had been formally joined. Inasmuch as the information was valid and the jury duly sworn and charged with the defendant's deliverance, he was put in jeopardy, so that had he been acquitted he could not have been again prosecuted. He knew perfectly well the offense with which he was charged, and was allowed to make his defense just as fully and effectively as if a plea of not guilty had been made; and the question now is whether the inadvertent omission of arraignment and plea, which has not in the least affected any substantial right of the defendant, should be held fatal to the judgment.

It is freely conceded that the early Wisconsin decisions answer this question in the affirmative. *Anderson v. State,* 3 Pin. 367; *Douglass v. State,* 3 Wis. 820; *Davis v. State,* 38 Wis. 487. See, also, *Crain v. U. S.* 162 U. S. 625, 16 Sup. Ct. 952, where the authorities are reviewed and the doctrine contended for by the defendant fully sustained by a divided court. It must also be conceded that it is held by the supreme court of the United States in the *Crain Case* that arraignment and plea are essential to due process of law, guaranteed to the citizen by the XIVth amendment. A state could not therefore pass a law providing for trial without arraignment or plea; but that does not necessarily affect the question whether a citizen may not effectually waive that right. This court has held that constitutional rights may be waived by the defendant, except perhaps in capital cases. Thus an accused person has the absolute constitutional right to a trial by a jury, which means a body of twelve competent jurymen; yet this court held, as early as the case of *State v. Vogel,* 22 Wis. 471, that by not exercising his right of challenge the defendant waived all objections to the qualifications of jurors, and a verdict of

guilty would stand notwithstanding the fact that one of the jurors was an alien and the further fact that his alienage was not known to the defendant. This doctrine was approved in *Flynn v. State,* 97 Wis. 44, 72 N. W. 373 (without, however, citing the *Vogel Case*), and even carried further, for the *Flynn Case* was a capital case, and the court said that the defendant's announcement that he accepted the jury was "in effect the withdrawing of *all* previous objections to the competency of the jurors, and a consent to be tried by that jury which could not afterwards be withdrawn." This rule has been followed in the following cases: *In re Roszcynialla,* 99 Wis. 534, 75 N. W. 167; *Emery v. State,* 101 Wis. 627, 78 N. W. 145; *Cornell v. State,* 104 Wis. 527, 80 N. W. 745; *Schwantes v. State,* 127 Wis. 160, 106 N. W. 237; and *Okershauser v. State,* 136 Wis. 111, 116 N. W. 769.

In the case of *In re Staff,* 63 Wis. 285, 23 N. W. 587, it was held that a statute permitting a defendant to waive a jury trial was not unconstitutional, and Justice LYON, in the opinion in that case, says (on p. 294) sec. 7, art. I [of the constitution], "confers many rights upon a person accused of crime, every one of which he may waive, without authority of statute, as has often been judicially determined, except the right to be tried by a jury. Such waiver may be express, or it may be by failure to make due objection and exception." He then makes an elaborate enumeration of the many rights conferred which the prisoner may waive, which is worth examination. In *Hill v. State,* 17 Wis. 675, and *Stoddard v. State,* 132 Wis. 520, 112 N. W. 453, it was held that, following the same principle, a defendant might waive his right to be present when the verdict was returned, and did so waive it by absenting himself voluntarily from the room when the jury came in. It is true that it was held in *State v. Lockwood,* 43 Wis. 403, that the right of the accused to a jury trial could not be waived, and this was followed in *Jennings v. State,* 134 Wis. 307, 114 N. W. 492, when it was held that the defendant

could not agree to a trial by eleven jurymen. As said in *Okershauser v. State, supra,* this rule, however, is not to be extended.

It must be conceded, therefore, that many constitutional guaranties may be waived by the accused in all criminal actions, except capital cases, and the question here presented is whether the court should follow the early cases holding that arraignment and plea cannot be waived, or abandon that principle. Of course no rule of property is involved, and so the court is measurably free to establish another rule if it seem that the former rule is unsound or not supported by the better reason.

The ancient doctrine that the accused could waive nothing was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted. It arose in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty or some other grievous punishment out of all proportion to the gravity of his crime. Under such circumstances it was well, perhaps, that such a rule should exist, and well that every technical requirement should be insisted on, when the state demanded its meed of blood. Such a course raised up a sort of a barrier which the court could utilize when a prosecution was successful which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story, had been unjustly convicted, but yet under the ordinary principles of waiver, as applied to civil matters, had waived every defect in the proceedings.

Thanks to the humane policy of the modern criminal law we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the state, and may have his witnesses summoned and paid for by the state;

not infrequently he is thus furnished counsel more able than the attorney for the state. In short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is, Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it.

Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there is error because he was not given his right? Should he be allowed to play his game with loaded dice? Should Justice travel with leaden heel because the defendant has secretly stored up some technical error not affecting the merits, and thus secured a new trial because forsooth he can waive nothing? We think not. We think that sound reason, good sense, and the interests of the public demand that the ancient strict rule, framed originally for other conditions, be laid aside, at least so far as all prosecutions for offenses less than capital are concerned. We believe it has been laid aside in fact (save for the single exception that trial by a jury of twelve cannot be waived unless authorized by a specific law) by the former decisions of this court.

It is believed that this court has uniformly attempted to

disregard mere formal errors and technical objections, not affecting any substantial right, and to adhere to the spirit of the law which giveth life rather than to the letter which killeth. It may not always have succeeded; it is intensely human, but since the writer has been here he knows that the attempt has been honestly made.

In this line the court is glad to welcome legislative assistance and approval. By ch. 192, Laws of 1909 (sec. 3072*m*, Stats.), it is provided that no judgment, civil or criminal, shall be set aside or new trial granted for any error in admission of evidence, direction of the jury, or any error in pleading or procedure, unless it shall appear that the error complained of has affected the substantial rights of the party complaining. How much this adds to the provisions of sec. 2829, which has been on the statute books since 1858, is not entirely clear. At least it shows the legislative intent to specifically apply the law to criminal actions. Its terms are clear, and will unquestionably assist the court in its effort to do substantial justice in all actions, either civil or criminal, without regard to immaterial errors or inconsequential defects. This court will loyally stand by this law, and will earnestly endeavor to administer it so as to do equal and exact justice so far as human effort can accomplish that end.

Our conclusion is that the doctrine of *Douglass v. State,* 3 Wis. 820, and the cases following it, should be overruled. The principle now declared is that the right of arraignment and plea will be waived by the defendant by his silence when he ought to demand it, in all cases (except capital cases) where it appears that he is fully informed as to the charge against him and is not otherwise prejudiced in the trial of the case by the omission of that formality. Other Code states so hold. *People v. Osterhout,* 34 Hun, 260; *People v. Bradner,* 107 N. Y. 1, 13 N. E. 87; *State v. Cassady,* 12 Kan. 550; *State v. Straub,* 16 Wash. 111, 47 Pac. 227; *Hudson v. State,* 117 Ga. 704, 45 S. E. 66.

3. The last error alleged relates to the charge. The court concisely and correctly instructed the jury as to the presumption of innocence and their duty to convict *only* if convinced beyond a reasonable doubt of the defendant's guilt, and the jury retired. After some hours spent in consultation without reaching an agreement they were brought into court and the trial judge gave them an additional charge, in which he told them, in connection with other remarks, that cases were to be decided upon the weight of evidence, not by counting witnesses, and that a single witness may be more satisfying than a half dozen witnesses who contradict him; further, that this was not a case of mistake, but some one had falsified, and that they might consider the motive of the boy who testified to purchasing the liquor, if he had any motive in making a charge that was false, and other remarks in the same general line.

It has been held by the court that in a case where one witness on one side is contradicted by another witness on the other side as to the pivotal fact on which the case turns, and there is no possibility that the testimony of either witness can be the result of mere mistake, it is not prejudicial error to say to the jury that one or the other has committed perjury and to suggest that a motive should be found for such perjury. *Jackson v. State,* 91 Wis. 253, 64 N. W. 838; *Douglass v. State,* 43 Wis. 392. See, also, *Schutz v. State,* 125 Wis. 452, 104 N. W. 90. We do not regard the statement that cases are to be decided upon the weight of evidence, not by counting witnesses, as calculated to convey a false impression to the jury. They had been expressly and clearly charged that they were only to convict in case they were convinced beyond a reasonable doubt; and this instruction was neither expressly nor impliedly withdrawn, and the one afterward given as to the weight of evidence is not inconsistent with it.

By the Court.—Judgment affirmed.

KERWIN, J., dissents.

The following opinion was filed January 11, 1910:

TIMLIN, J. (*dubitans*). There was neither arraignment nor plea in this case. The decision overrules *Anderson v. State,* 3 Pin. 367; *Douglass v. State,* 3 Wis. 820; and *Davis v. State,* 38 Wis. 487. These precedents, while mitigating the rigor of the ancient law, had their roots deep in antiquity. Cooley, Const. Lim. (5th ed.) 379, and note 1; Id. (7th ed.) 439, note 2. They were in harmony with the great weight of authority. 2 Ency. Pl. & Pr. 761–792. As stated in the majority opinion, they stood in the supreme court of the United States for due process of law. Notwithstanding the Chief Magistrate, who holds position and promotion in the hollow of his hand, has spoken, and that his words have kindled in the University a flame in whose light we are now administering the criminal law, I am reluctant to proceed so radically and so rapidly along the path of reform. In every well-ordered commonwealth the legislature is the appropriate exponent of public opinion. The courts, for obvious reasons, are not and should not be such exponent. I think even we who are in sympathy with the President and the University should have waited for the legislature to act.

Again, regarding these overruled precedents as merely establishing rules of procedure, is it possible to establish any orderly procedure which will relieve from the consequences of such gross negligence as failure to arraign the accused and to ascertain whether he pleads guilty or not guilty, former conviction, former acquittal, the statute of limitations, lack of jurisdiction in the court, privilege from arrest, or some other defense? When we have changed the precedents to meet this case of negligence, will that avail against negligence of the same degree which will appear in another form, or with reference to some other essential of an orderly trial? These considerations make me doubt, hesitate, and refuse my assent. Again, with such slaughter of precedent there should go in

justification or mitigation "reasons of good regard." Else this were a savage spectacle.

Now it may be that these precedents deserved this fate. They perhaps deserved death in order that we all might live. They were certainly guilty of being old. They were not innocent of having been born at the wrong time. They perhaps distracted the circuit judges in the consideration of fine scholastic distinctions concerning lack of ordinary care by intruding upon them some rude, practical experience in the exercise of ordinary care. Like primeval man before his fall, unconscious of sin, they neglected to cover themselves with foliage. They obtruded their classical clearness and simplicity against the turgid toploftiness which closed the nineteenth and began the twentieth century. They failed to stand for any corporate privilege or advantage. For all this they perhaps deserved amortization. But before Oblivion's curtain falls upon them forever, let me say that in my youth, before professional success and competence and a seat on the supreme bench had their value impaired by realization, and while such things were bright with the glamour of anticipation, these precedents seemed to me profound in their wisdom, unimpeachable in their authority, and clear, definite, and correct in their doctrine. Mentors of my brighter days, farewell!

The following opinion was filed January 12, 1910:

BARNES, J. (*dissenting*). I agree with the chief justice that ch. 192, Laws of 1909 (sec. 3072*m*, Stats.), should receive a liberal construction, and that the failure to arraign the defendant on trial was an immaterial error that might well be disregarded after verdict. I think, however, the judgment should be reversed. The material testimony in the case was given by the complaining witness on the one side, and the defendant in the case and his mother on the other. The evidence offered by the state was in direct conflict with that of-

fered by the defendant. After the jury had deliberated for some time it announced that its members were unable to agree upon a verdict, whereupon the court delivered an additional charge, in which it expressed surprise at the result announced. The court told the jury that it could consider the motive of the complaining witness in fabricating the story he told, if he did fabricate it, and the lack of interest which he had in testifying falsely, as well as the interest of the defendant in the result of the prosecution. This was certainly going far enough. The jury was further instructed:

"There is nothing in the evidence in this case to show why he [the complaining witness] should say that *William Hack* sold this [the liquor] to him, rather than some other saloon-keeper."

I think this portion of the charge was not only argumentative, but was well calculated to result prejudicially to the defendant. Taken as a whole, an intelligent juror would naturally understand the language of the court to mean that in its opinion there was no reason or room for disagreement, because it must be assumed that the complaining witness told the truth for the reason that he had no motive for falsifying, while the defendant and his mother had. It is substantially the same kind of an instruction that was condemned by this court in *Bodenheimer v. C. & N. W. R. Co.* 140 Wis. 623, 123 N. W. 148, and in other cases cited in the opinion in that case. It has been the policy of our jurisprudence in this state to inhibit courts from telling juries how they thought cases should be decided. I think such policy represents the highest development of the law pertaining to jury trials. So long as juries are permitted to decide questions of fact, they should be permitted to do so without dictation or suggestion. In the ordinary case, where the evidence is conflicting, an intimation from the trial court as to how it thinks facts should be found is all-sufficient to secure a verdict in accordance with the suggestion. Certainly, no one can say that the instruction in

question was not directly responsible for the verdict returned. The reasonable probabilities are that it was. If erroneous, it was in my judgment prejudicial; and I think it was erroneous.

The following opinion was filed January 29, 1910:

MARSHALL, J. (*concurring*). The decision seems to be such a significant recognition of the written law designed for judicial guidance by the wise lawgivers of our early state history that I cannot well forego adding briefly to the opinion of the chief justice, to the end that no thought may, necessarily, be indulged in that the result is a stretch of judicial authority, or inconsiderate abrogation of precedents, in response to mere public opinion, generated by any one however exalted, or promoted by any class however worthy.

The great reluctance of courts to lay aside a technical rule, sanctified by age, even after all reasons for its being dignified as vital have ceased to exist, and few even appreciate its basis or the reason for the former significance,—is well illustrated by the tenacity with which they have adhered to the idea that arraignment and plea, before impaneling the jury in a criminal case, are so essential to validity of the trial, that neither ought to be, and that the plea certainly is not, a matter that can be waived. That idea, with some others, long prior to the Code, only had vitality to vex courts, afford facility to persons not adequately imbued with true legal ethics, to lay traps for judicial administrators and embarrass and sometimes defeat justice, and was intended to be swept away by the Code adopted more than half a century ago.

The reformed procedure was received coldly by many, especially of the older practitioners and judges. We do not to this day fully appreciate the great judicial revolution intended by it, rendering justice more certain, more speedy and more economical of attainment. Appreciation of the in-

tended change has come about so slowly that, after fifty-three years, we are quite far from fully comprehending its beneficent purpose, and judicial inertia in that regard in the particular situation is only overcome by a redeclaration, with some slight change of phraseology, of the wise public policy that,

"The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Sec. 2829, Stats. (1898).

How those words grow upon one as we comprehend the conditions the Code was intended to displace! Old methods with their numberless technicalities and sanctity of unsubstantials, at one stroke, were, in contemplation of the statute builders, put aside and in place thereof was erected a simple, easily understood and administered system of procedure, conformable to the idea that the attainment of justice is the only legitimate end sought in litigation, and that mistakes without prejudice, however numerous, and mere useless formalities should not bar the way to such attainment, nor make that end uncertain or needlessly difficult to reach.

The reason for the ancient vital character of calling the prisoner to stand before the court with uplifted hand in acknowledgment of his identity, reading the indictment to him in English, propounding the formal question in respect thereto and taking and recording his response, was because of the indictment being in Latin, the accused not having the aid of counsel nor being permitted to testify in his own behalf. When the charge came to be framed in quite simple English, understandable by most any one, and the prisoner to have the assistance of counsel and the right to testify in his own behalf and to have the full benefit of the presumption of innocence the same as if he denied the charge in the most formal and positive way, whether he did so in fact or not, the mere ar-

raignment and plea lost very much of their ancient significance, since going to trial without them involved, by necessary inference, a denial of guilt and challenge of the state to prove the contrary. Subsequent holdings that such formalities could not be waived expressly or by necessary inference gave controlling effect to compliance with useless formalities.

That a conviction by a jury without arraignment or plea is invalid is held by many courts under common-law procedure and some under Code procedure as well. Case after case might be cited. But the more extended the citations the greater the proof of reluctance of courts to free themselves,—even with the assistance of written laws in spirit commanding it,—from the thraldom, so to speak, of useless technicalities. This court, especially in recent years, has, generally speaking, cut loose from all such interferences with the administration of justice. There are a few situations, where to break away meant the overruling of a long line of decisions made, perhaps, by overlooking or not appreciating the intended displacement by the Code with which some have not been able easily, if at all, to bring themselves into full harmony.

In the situation suggested the re-enactment of sec. 2829, Stats. (1898), as an admonition from the body of the people, perhaps may be helpful in rescuing the judiciary from any such disability.

The first decision in this state as to the absolute necessity of a formal plea was *Anderson v. State,* 3 Pin. 367, which was followed by *Douglass v. State,* 3 Wis. 820. They were decided before the adoption of the Code.

The logic of such cases was not fully followed after such adoption in *State v. Cole,* 19 Wis. 129, in that the court held that impaneling and swearing the jury before arraignment and plea, was not fatal error. That case was discussed without being overruled in *Davis v. State,* 38 Wis. 487, the court, however, affirming the early cases. That the subject was not very much studied, is evident because it was said no authority

to the contrary of the decision was cited and the court could not find any, and because the effect of the Code was entirely overlooked.

As early as 1845, as indicated in *Fernandez v. State,* 7 Ala. 511, cited by the court, under a Code somewhat similar to ours, it was held that to go to trial without objection, was equivalent to a formal arraignment and plea and that the mere formality of entering a plea on the record could be satisfied at any time.

In *People v. Osterhout,* 34 Hun, 260, also cited by the court, the subject was treated thus:

"The defect is merely technical, affecting no substantial right whatever." "Nor may this court on appeal regard technical errors or defects or exceptions which do not affect substantial rights" (referring to a statute from which ours was copied). "If this section is to have any meaning at all it applies exactly to a case like the present. . . . Everyone who knows anything of a criminal trial must see that the omission did the defendant no harm. . . . Where the prisoner appears with his own counsel, the omission formally to arraign and ask for a plea is immaterial to his rights and may be deemed to be waived."

This in *People v. Bradner,* 107 N. Y. 1, 9, 13 N. E. 87, 90, is to the same effect:

"A formal plea of not guilty is not necessary to put the defendant on trial." Further, in effect, going to trial as if an issue were formed, all participants acting as if all formalities had been complied with, is equivalent to arraignment and plea. "It would be sacrificing substance to form not to give effect to the transaction according to the plain understanding of the court and the parties."

Further cases cited by the court are on the same line, as follows:

In *State v. Cassady,* 12 Kan. 550, it was conceded that absence of a plea formally joining issue was fatal to a conviction at common law. "But," said the court, "under our

statutes we think a different rule must obtain." And referring to statutes to accomplish the same result as our sec. 2829, and a similar statute to ours as to entering pleas for the accused upon his refusal to plead,

"It seems to us that under those sections the omission did not and could not affect the substantial rights of the defendant, and therefore is not ground for disturbing the judgment."

State v. Straub, 16 Wash. 111, 47 Pac. 227, is significant in that it was a capital case. The Code was the same, substantially, as ours. Acknowledging fully the common-law rule, the court said:

"We think, under the system adopted by the Code in this state, that such an omission is purely technical, that it does not affect any of the substantial rights of the defendant, and that, if otherwise properly convicted, the judgment should not be reversed. Indeed, this is the holding of many modern courts under statutes similar to ours."

In *Hudson v. State,* 117 Ga. 704, 45 S. E. 66, the court said, substantially, a person who goes to trial without a formal plea, but in all respects as if one had been entered, and has had the benefit of the presumption of innocence, cannot thereafter take advantage of what he thus waives. He is not prejudiced in any right.

In view of the foregoing it cannot well be said the court, by the judgment here, has changed the law, invading the legislative field in that regard. The legislature by the Code abrogated the doctrine that arraignment and plea in a criminal case cannot be waived. The difficulty is that such fact was overlooked in *Davis v. State,* 38 Wis. 487. That and, perhaps, a few other failures here to respond to the broad spirit of the judicial reform of 1856, doubtless led to the re-enactment in 1909 of sec. 2829 of the Statutes.

While, in my judgment, the decision here is conformable to and required by the law of 1856 and numerous decisions that rights even of a fundamental character may be waived in a

criminal as well as in a civil case, overruling the principles of *Davis v. State, supra,* I claim for the court inherent power and duty to reach the same result independently of legislative assistance. The doctrine of *Davis v. State* as to arraignment and plea not being waivable, is wholly of judicial creation. Not only, as said by the chief justice, have the basic reasons which suggested such doctrine as a guard against injustice, long since ceased to exist, but just as weighty reasons, prior to the legislation of 1856, called for its abrogation as a useless interference with the due administration of justice. The inherent power of the court, which originated the doctrine to satisfy seeming requirements of the social state which no longer exist, may properly be used to lay it aside as a legal curiosity appreciable only by a knowledge of its antecedents and inadaptable for any beneficial purpose in our modern life.

CITY OF SUPERIOR, Appellant, vs. DOUGLAS COUNTY TELEPHONE COMPANY and others, Respondents.

September 17, 1909—February 1, 1910.

Contract with city for telephone service: Validity: Proposal and acceptance: Consideration: Discrimination in rates: Public policy: Subsequent legislation affecting obligation of contracts: Railroad Commission: Action attacking order: Joinder of causes and of parties: Demurrer.

1. Where, before the enactment of ch. 499, Laws of 1907, a telephone company, in order to afford its patrons connection with the departments of the city government, offered to install and maintain telephones free of charge in such departments, and the common council accepted such offer, granting leave to the company to install its telephones in specified offices upon condition that the service should be first-class at all times and be continued so long as the company should operate a telephone system in the city, and the company accepted such conditions by installing the telephones as specified, a valid contract based upon sufficient consideration resulted.

2. No written acceptance by the company of the privilege so granted was necessary to create a contract.
3. Such a contract, if valid when made, is not affected by subsequent legislation prohibiting discriminatory rates, but is protected by the constitutional provision against impairing the obligation of contracts.
4. At common law a public-service corporation may for special reasons make a different rate to one person than to another, or accept payment from one in money and from another in services or some reasonable equivalent,—only *unjust* discriminations being condemned.
5. In a contract between a public-service corporation and a city, advantage given to the city over other patrons inures to the benefit of the public and does not, at common law, render the contract unenforceable.
6. A contract by which a telephone company, in return for the privilege of placing telephones in the city departments, agreed to maintain such telephones free of charge so long as it continued to operate a telephone system in the city, was not so uncertain or indefinite as to its duration, or so unreasonable in that respect, as not to be enforceable according to its terms. MARSHALL, J., doubts.
7. The special statutory action provided for in sec. 1797*m*—64, Stats. (Laws of 1907, ch. 499), to vacate an order of the Railroad Commission alleged to be invalid, cannot be joined with another action of primary import against another party to prevent the latter from complying with such order. MARSHALL, J., *dissenting*, is of the opinion that the two causes of action may be joined; that both the Railroad Commission and the public-service corporation to which the order in question is directed are necessary parties to the litigation. BARNES, J., is of the opinion that the Commission is a proper party to the action against such corporation.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed in part; affirmed in part.*

Action to enjoin defendant telephone company from discontinuing maintenance of telephones in plaintiff's city and public library buildings under the agreement to do so free of charge to it pursuant to which they were placed therein, and nullify action of the State Railroad Commission requiring such discontinuance.

The complaint is to this effect: About May, 1904, plaintiff and defendant telephone company made an agreement whereby the former extended to the latter the privilege of placing one telephone in each of eleven of the former's departments in its city building and one in its public library building, and promised to maintain the same so as to afford telephone communication between the company's patrons and such public officers, making all changes in such buildings necessary to the proper installation, and continue the facilities for telephone communication thus created during the life of the agreement, and, in consideration of such privilege and the advantage to such company thus created of making its service more desirable to existing patrons and so of retaining their patronage and gaining new customers upon the faith of such increased scope of service, it agreed to accept the privilege as granted with the condition affixed thereto that telephone service should be first class at all times and be continued so long as the company should maintain and operate a telephone system in the city. The company duly performed by installing and maintaining the telephones, and full performance on both sides was continued down to the commencement of this action, when such performance, on the part of the company, was about to be interrupted, and could only be prevented by judicial intervention, because, October 14, 1908, defendant Railroad Commission, basing its action on the law of 1907 creating such Commission, ordered the company, in disregard of its agreement, which was in full force at the time such legislation took effect, to discontinue performance. The company, pursuant to such order, notified plaintiff that it would cease performance of its agreement after November 10, 1908. The agreement contemplated substantial benefits to the telephone company as consideration for performance of its obligation, which benefits have in fact been enjoyed, while some injury has been caused to plaintiff's property by reason of changes in its buildings necessarily made in the course of installing

the telephones, and some benefit has accrued to the public. The discontinuance of the telephone service and removal of the telephones will inflict a substantial injury to plaintiff by reason of consequent necessary repairs. Appropriate relief was prayed for. A motion on behalf of the plaintiff for a temporary injunction was denied. The Railroad Commission demurred to the complaint for insufficiency and the same was sustained. Both determinations were closed by a single order from which this appeal was taken.

For the appellant there was a brief by *Thos. E. Lyons* and *T. L. McIntosh,* and oral argument by *Mr. Lyons.*

For the respondent *Douglas County Telephone Company* there was a brief by *Miller, Mack & Fairchild,* and oral argument by *E. S. Mack.*

For the respondents constituting the *Railroad Commission* there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and oral argument by *Mr. Titus.*

The following opinion was filed October 5, 1909:

MARSHALL, J. The arguments of counsel cover a very wide range as to whether the transactions detailed in the statement show that a contract was made between appellant and respondent telephone company. On that branch, waiving the matter of public policy, such purely elementary principles are involved that it is not thought best to follow the intricacies of the arguments with which the court has been favored. What constitutes a contract, in the general sense, is too familiar to require discussion. If there was an offer on one side to render a service to the other within the competency of that other to receive for the use of its officers in the conduct of the public business or the convenience of the public, in exchange for a privilege of value within the competency of such other to grant and which was granted in such exchange, subject to legitimate conditions which were accepted, there is hardly room for argument but that a valid contract was made.

No pecuniary liability on the part of the city was contemplated in the transaction. Therefore, it is useless to consider appellant's charter provisions respecting the manner of making contracts in that field.

It is obvious that it was important for the telephone company to be able to afford its general customers facilities for communicating by telephone with the public offices. That opportunity could not operate otherwise than to render the service it offered in general more valuable than it would otherwise be and so attract customers and greatly extend its sphere of operations. That which it sought to obtain was then a legitimate basis for a contract. It is just as obvious that the service which it offered in return for the privilege sought could not be otherwise than valuable to appellant as a means of expediting the public business. Such privilege may well have been considered so specially valuable to the company as to be a fair equivalent for the free service, so called, that is free as regards appellant rendering any direct pecuniary consideration therefor.

No question is raised, or could well be, but that it was competent for appellant to contract for telephone service. So there is no question of competency in general to be considered. It is argued that no contract was made because the offer of the company was only conditionally accepted by appellant. That, of course, does not cut any figure, since the modified acceptance was submitted to by the company by installing the telephones. As in the case of any municipal privilege granted, no written acceptance was necessary. The actual enjoyment of the privilege granted was as effective to close the contract as a formal written acceptance, in the absence of any written law requiring a different acceptance.

Even in case of a legislative franchise granted upon specified conditions but without providing any manner of acceptance, use of the franchise constitutes an acceptance and creates contractual obligations. *Heath v. Silverthorn L. M. & S. Co.*

39 Wis. 146; *Madison, W. & M. P. Co. v. Reynolds,* 3 Wis. 287.

In a case of this sort parties are competent to contract the same as private persons. An offer on one side may be accepted by unqualified performance on the other, as well as in any other way, in case the offer does not otherwise require. This is so in harmony with the most familiar of elementary principles that nothing further need be said in respect to the matter. The facts show unmistakably that a binding contract was made as appellant claims, unless it is void upon grounds hereafter discussed.

It is suggested that the transaction contemplated treating appellant as a favored customer, contrary to public policy. It is conceded that there was no written law at the time the contract was made prohibiting the company from granting appellant a different rate for service than general customers, but it is insisted the circumstances fall within the common-law rule that a *quasi*-public corporation should afford the service it offers, to every person upon the same basis that it does to any one under the same or similar circumstances; that any substantial departure therefrom is an unjust discrimination and contrary to sound public policy, rendering any contract for such discriminatory service unenforceable by judicial remedies.

The contract in this case having been made before the legislation occurred prohibiting discriminatory rates, such legislation does not cut any figure in the case. If the contract were valid when made it is within the constitutional protection precluding the legislature from impairing the obligations of contracts. Moreover, it is by no means certain but that the special circumstances in this case would, in any event, take the same out of the common-law rule mentioned. We need not go further on this branch of the case than to suggest that it is not every discrimination in the treatment by public-service corporations of their customers which is condemned by the

common law. Only unjust discriminations are so condemned. For special reasons, in the absence of any written law on the subject, such a corporation may make a different rate to one person than to another, or accept pay from one upon a money rate and from another in service of a legitimate character or some other reasonable equivalent, so long as the compensation demanded is within reason under the circumstances. This subject covers a broad field. We leave it without stating much more than the rule in general, nothing further being at all necessary to the case in hand.

It should be noted that the legislature in enacting the law of 1907 (Laws of 1907, ch. 499), appreciating there might be contracts existing between public-service corporations and customers, valid in the absence of prohibition by written law, and that it was not within its competency to nullify or impair them, expressly provided at sec. 1797*m*—91, that:

"The furnishing by any public utility, of any product or service at the rates and upon the terms and conditions provided for in any existing contract executed prior to April 1st, 1907, shall not constitute a discrimination within the meaning specified. . . ."

Sufficient has been said to indicate that the question of whether the contract in question is unenforceable on grounds of public policy must be solved with reference to the condition of things at the time it was made. If public policy sanctioned it then, a change thereof by act of the legislature or otherwise does not affect its validity. Greenhood, Pub. Pol. 5.

Public policy as bearing on the validity, or in other words the judicial enforceability, of contracts, is that principle which maintains that a person cannot rightfully do or bind himself to do that which is inimical to the public good. So where a contractual situation is not found to be clearly within the principle condemning it, it cannot properly be said to be illegitimate merely because there is discrimination. Discriminatory contracts between public utility corporations and their

patrons which are held to be void as inimical to the public good are so held because unreasonable advantage is thereby given to one customer or a class over others, whereas all have a moral and legal right to equality of treatment. In case of the contract being between a private corporation and the state or other public corporation, whatever advantage the particular customer has over general customers, obviously, inures to the benefit of the latter in the aggregate. In other words, in the ultimate there is no discrimination which is inimical to the public good, and hence no violation of public policy. Such is the situation here. If we concede that the appellant under the contract was a favored customer, in that if the same advantages had been granted by contract to a private corporation the agreement would have been unenforceable, still in the circumstances here the contract is enforceable because the advantage is to the public instead of to any particular member thereof.

But it is argued that, conceding there is a contract as claimed by appellant, valid as regards any written or unwritten law, it is unenforceable, so far as executory, because no time is specified with reasonable definiteness for its duration. We assume that point is made relying on the familiar principle governing such cases as *Irish v. Dean,* 39 Wis. 562, and *Coffin v. Landis,* 46 Pa. St. 426, 430. The rule on the subject was stated in *Robson v. Mississippi River L. Co.* 43 Fed. 364, thus:

"When a contract is silent as to the matter of its duration, then it is ordinarily terminable at the pleasure of either party, reasonable notice being given to the other party. When there is nothing in a contract, when applied to its subject matter, which either directly or in fair implication can be considered to fix a limit to its duration, the law infers that the parties intended that such contract is terminable at the option of either party, reasonable notice of the exercise of such option being required, when such notice is needed for the protection of the other party to the contract." 43 Fed. 368.

That does not mean that a contract for continuous service is fatally indefinite so as to be subject to the option mentioned merely because it does not specify a time, presently definite, for its termination. As said in the case quoted from:

"The duration of a contract may be made dependent upon the expiration of a period of time, or upon the completion of a given undertaking, or the happening of some event, all of which in turn may be certain or uncertain as to the date when the undertaking may be completed, or the event may happen. This uncertainty, however, does not render the contract terminable at will." 43 Fed. 370.

It is conceded that the contract in question, in its letter, fixes a time for its termination, to wit, when the telephone company ceases to "maintain and operate a telephone exchange in said city." But it is argued that the language is ambiguous, because it would be so unreasonable for a telephone company to agree for such a mere privilege as that granted to give service through twelve telephones during the entire period of its existence as an operating company in the grantee city, that it cannot be there was any such mutual intention in this case. For my own part, the proposition thus presented is one of serious difficulty. However, it is the opinion of the court that it may well be the telephone company, under the circumstances, supposed the contract, taking it at its letter, provided for a fair exchange of equivalents. At any rate, in the opinion of the court, there is nothing in the situation presented to indicate that the agreement, taken literally, is so unreasonable as regards its continuance, as to warrant treating the language of the parties in that regard as ambiguous. Therefore, in the opinion of the court, the contract is binding according to its terms.

No question is raised as to whether, in any event, this case, from the showing made in the complaint, falls within some recognized head of equity jurisprudence. Therefore, we take it that the parties considerately waived that question. Hence

this court will not consider it. It follows that the ground upon which the general demurrer to the complaint was sustained and the temporary injunction denied is untenable, and that others, if any there be, are deemed waived.

It is the opinion of the court that the order sustaining the demurrer as regards the improper joinder of actions should be affirmed; that the statutory action created to enable a party aggrieved by an order of the Railroad Commission, by action against such Commission to challenge the validity of such order, is not joinable with another action of primary import against some other party, to prevent the latter from complying with such order; that the statute does not contemplate affording opportunity to compel the Railroad Commission to appear in court as a party defendant and vindicate the validity of its action upon such validity being challenged at the suit of another against a third person, and that to permit such to be done would unduly prejudice administration of the law by such Commission. Sec. 2647, Stats. (1898), on the subject of joinder of actions, it is thought, does not permit the special statutory action against the Commission to be joined with any other.

The point is made that the complaint is demurrable because it is aimed at an order of October 14, 1908, which is based on one of June 12, 1908, in favor of which the limitation of time to question the validity under sec. 1797*m*—65, expired before the action was commenced. It is a sufficient answer thereto that the complaint is silent about any order of June 12, 1908. So far as the pleading shows, the order of October 14, 1908, is wholly an original matter.

From the foregoing it follows that the order appealed from, as regards the temporary injunction and the general demurrer, is reversed, and that as regards improper joinder of causes of action, it is affirmed.

By the Court.—So ordered, with costs in favor of appellant against the telephone company and costs in favor of the Railroad Commission against appellant.

The following opinion was filed October 21, 1909:

MARSHALL, J. (*dissenting in part*). It seems proper, though it is unusual, for one, after having written the opinion of the court, with which the writer is in harmony in the main, by an independent opinion to state such individual views as are not in such harmony. I have taken that method on other occasions and am constrained to follow it as a practice where it can be done without prejudice to vindicating fully the court's judgment of the case. So much for what may seem somewhat novel in writing at the same time the main and a dissenting opinion, in part, as well.

I will not add here more than a suggestion to what is said in the decision indicating doubt as to whether the contract for maintenance of the telephones indicates with sufficient certainty the time of its termination to take it out of the rule as regards terminability at the option of either party. Much could be said on that question. I rather incline to the view that the parties to the contract did not intend that the agreement should be substantially perpetual.

The conclusion of the court that the demurrer for improper joinder of causes of action was well taken, involved a decision that two good causes of action were, in form, stated in the complaint, one against the Railroad Commission to secure judicial condemnation of the order to discontinue the telephone service under the contract upon the ground of such order being unlawful, and one against the telephone company to prevent its terminating such service. Probably the latter cause of action, had the question been raised properly, would have been hard to maintain in equity in face of the general rule that any party to a contract may breach it and submit to responsibility for damages. That is subject to exceptions, perhaps, covering cases where the injury is irreparable by an award of damages, but it would be difficult to bring this case within such exception and we pass that.

The cause of action against the Commission is expressly

provided for by ch. 499, Laws of 1907. The legislative plan is that the validity of any order of the Commission shall only be challenged in an action in which such Commission is a party defendant, commenced in Dane county. Sec. 1797*m*—64. That provides for quite a summary way of testing such a question and was clearly designed to be exclusive, the idea being that business interests should not be prejudiced by long-continued uncertainty as to validity of a Commission regulation, and that in case of such validity being challenged by judicial proceedings to annul it the officials charged with the duty of enforcing it and who originated it should have opportunity to be heard, representing the state. That such is the scheme written into sec. 1797*m*—64 and the associate sections is made plain beyond reasonable doubt in the fact that by sec. 1797*m*—65 a short limitation, upon the right to challenge the validity of a Commission order, is created. It is there provided, in effect, that unless an action shall be brought in Dane county against the Commission to test the validity of any determination made by it within ninety days after the entry thereof, no question in that regard shall be regarded as open to judicial interference. All rights in that regard "shall terminate absolutely at the end of ninety days after such entry or rendition" are the unmistakable words of the law.

Pursuant to the statute this action was commenced in Dane county. It is clear that the dominant purpose was to test the validity of the order requiring discontinuance of the telephone service. The able lawyer who commenced the action should not be condemned as having made such a blunder as to commence an action seeking to prevent the telephone company from removing its telephones from the city buildings, yet left the order requiring such removal unchallenged, so that, in case of a judgment in plaintiff's favor as to the telephone company, the latter would be immediately brought face to face with a written law, in effect, plainly requiring it to do the very thing it was prohibited from doing by the judgment.

Had the plaintiff not joined the two causes of action, so really dependent upon each other as aforesaid, and made the telephone company alone a party, under competent legal advice, such company would, doubtless, have seasonably moved the court for an order bringing in the Commission, to avoid being ultimately placed in the probable uncomfortable situation of inability to obey the final judgment without violating an unimpeachable order of the Commission, and inability to obey such order without defying the judgment of the court.

Again, in case of the nonjoinder the circuit court would have observed, at once, that it was impossible to deal effectually, fairly, with the relations between the plaintiff and the telephone company, without at the same time passing upon the validity of the Commission's order. So it would have faced a situation unmistakably within the contemplation of the legislature when it incorporated into the Code the direction that "when a complete determination of the controversy cannot be had without the presence of other parties, or any persons not parties to the action have such interests in the subject matter of the controversy as require them to be made parties for their due protection, the court shall order them to be brought in; . . ." Sec. 2610, Stats. (1898).

A failure under such circumstances to observe that very salutary Code provision would, it seems, have been such plainly fatal error as to require a reversal on appeal in case of this court obtaining jurisdiction of the cause, even if the question was not raised by any party to the litigation. *McDougald v. New Richmond R. M. Co.* 125 Wis. 121, 129, 103 N. W. 244; *Washburn v. Lee,* 128 Wis. 312, 320, 107 N. W. 649.

I am unable to see any escape from the foregoing; neither can I see any warrant for holding that in creating the method prescribed in the act of 1907 for challenging the validity of a Commission order by action, the legislature did not intend that all the Code provisions for the orderly and proper conservation of the rights of parties should apply to the statutory

action. On the contrary, it seems the lawmaking power must have had that in contemplation and not have thought to create a system that might cause such a clash of duties as must inevitably sometimes occur under such a practice as the decision in this case lays down. I cannot escape the conclusion that such practice runs directly counter to the plain mandate of the Code, and the familiar principles of equity which such mandate dignified by incorporating them into the written law.

The validity of the contract is germane to the validity of the order, since if the former be valid it is beyond the jurisdiction of the Commission to interfere with its execution, as indicated in the decision of the court. The validity of the order is, for the same reason, germane to the validity of the contract.

So the two matters were joinable upon the most familiar of equitable principles. The Commission was a proper party, since the scheme of the law of 1907 is that it shall represent the state in such a matter, if the dominant purpose of the action were to prevent the telephone company from removing the telephones from the city buildings, and the telephone company was a proper party if the dominant purpose of the action were to nullify the Commission's order, while if the dominant purpose were to deal with the telephone service, as such, then the validity of the contract and of the order were both germane thereto.

Thus in any aspect of the matter, the Commission and the telephone company were properly brought into court in one action to settle all the questions so inseparably dependent upon each other. In no other way could complete or real justice be done to any party to the litigation.

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." Sec. 2603, Stats. (1898); *Gager v. Marsden,* 101 Wis. 598, 607, 77 N. W. 922.

Further discussion does not seem necessary to demonstrate the correctness of my position that, by the plain provisions of the Code, the Commission was not only a proper but was a necessary party to the litigation against the telephone company, and the latter was not only a proper but was a necessary party to the litigation against the former,—and to absolve myself from personal responsibility for upholding the contract and at the same time dismissing the Commission from the suit, so that the telephone company may not be able to enjoy the relief it obtained by the judgment without incurring the severe penalties of the Commission law for violation of its order, which, if not valid at the start, may become so by limitation upon the use of judicial remedies for questioning such validity.

BARNES, J. I concur in so much of the foregoing dissenting opinion of Mr Justice MARSHALL as holds that the Railroad Commission of Wisconsin was a proper party to the action.

WINSLOW, C. J., took no part.

Motions for a rehearing, made by the *Railroad Commission* and by the *Douglas County Telephone Company,* were denied February 1, 1910.

ATLANTA & WALWORTH BUTTER & CHEESE ASSOCIATION, Respondent, vs. SMITH, imp., Appellant.

October 6, 1909—February 1, 1910.

Corporations: Purchase of their own stock: Rights of creditors: Assets as trust fund: Liability of stockholders: Fraudulent conveyances: Estoppel: Action at law or in equity?

1. As a general rule, in case a corporation purchases its own stock, paying therefor by corporate assets, subsequent creditors cannot be regarded, judicially, as prejudicially affected.

2. As a general rule, unless plainly prohibited by statute or its organic act, a corporation may buy its own stock, using its assets therefor, so long as it acts in good faith pursuant to authorization by its governing body, and its officers, acting in like good faith, may do so as to stockholders actually or impliedly consenting and as to past or future creditors.
3. The trust-fund doctrine that under all circumstances the assets of a corporation constitute a trust fund for creditors does not prevail in this state.
4. In general, under sec. 2320, Stats. (1898), a transfer of property cannot be impeached for fraud upon subsequent creditors of the transferor unless there was at the time of the occurrence mutual intent to defraud them.
5. If a stockholder of a corporation, by agreement with it or any of its officers, sells his stock to the organization in exchange for corporate assets, knowing, actually or constructively, that the result will be to render the corporation insolvent: all parties to the transaction contemplating that it will continue in business and incur indebtedness as before, the creditors relying upon appearance of the previous solvent condition continuing,—the result to them must be presumed to have been mutually intended, supplying the element of bad faith essential to condemn the transfer.
6. In the circumstances stated in No. 5 the stockholder, co-operating in creating the delusive appearance, as to subsequent creditors, is estopped from claiming that his relations to the corporation were severed by the transaction so far as their continuance is necessary to preserve statutory liability under sec. 1773, Stats. (1898).
7. A transaction in the circumstances stated in No. 5 is void as to subsequent creditors by the law of estoppel and by sec. 2320. Stats. (1898), as well.
8. Where a transaction involving a transfer of property is void as to creditors of the transferor, and equity jurisdiction is not necessary to remove a cloud on title or for some other relief within the peculiar field of equity jurisdiction, the creditors may proceed at law, treating such transaction as if it never occurred, it being void as to him, and the bringing of an action inconsistent with validity of the transfer being a sufficient election.

[Syllabus by MARSHALL, J.]

9. TIMLIN, J., *concurring*, is of the opinion, further, that a corporation which has not had fifty per cent. of its capital stock subscribed has no power to dispose of its assets to a shareholder in purchase of his shares.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action by a creditor of the Superior Produce Company, a Wisconsin corporation, to recover of its stockholders upon the ground of their being personally liable for indebtedness incurred by the corporation in business carried on before one half of its capital stock was subscribed for.

The complaint contained two causes of action, one on an account for $115.44 and on a note for the same amount, both account and note having been duly assigned to the plaintiff, and the other for $549, a balance of account which accrued in plaintiff's favor. Defendant *Frank M. Smith,* who only answered, claimed that he became a stockholder January 15, 1906, and ceased to be such July 14, 1906, and otherwise put in issue all allegations of the complaint.

The cause was tried by the court, resulting in this decision as to facts: The Superior Produce Company is a Wisconsin corporation organized in 1905, with an authorized capital of 100 shares of $100 each. Shortly after such organization thirty-one shares were subscribed for, as follows: W. H. Cloud sixteen shares, J. K. Stephens ten shares, and C. K. Stephens five shares. The stock so subscribed for was fully paid. No other stock was taken. The corporation, however, commenced doing business and incurring indebtedness as soon as organized. About January 15, 1906, *Smith* became the owner of fifteen shares of stock, purchased of J. K. and C. K. Stephens. Except as hereafter stated he continued such owner down to the time of the trial. About June 26, 1906, the corporation incurred the indebtedness of $115.44 mentioned in the complaint. Thereafter it gave to the creditor a note for such amount and subsequently, before this action was commenced, plaintiff became the owner of the indebtedness and the note. July 1, 1906, the corporation was indebted to *Smith* for money loaned to it in the sum of $1,300, at which time he and the president, W. H. Cloud, knew the business had proved a failure financially. July 14, 1906, by an agreement between *Smith* and Cloud, the latter, without express authority, as-

suming to act for the corporation, its property, in the main, valued by them at $3,607.80, was transferred to *Smith* for his stock at its par value, his account to the extent of $900, his assumption of a mortgage indebtedness on the property of $832, and other indebtedness on such property of $107.80, he at the same time drawing from the corporation in money $327.92 as the balance of his account. They then owned all the corporate stock outstanding. Before the transfer the value of the assets of the corporation, at a somewhat over-appraisement, was in excess of its liabilities to the extent of $794.75. The result of the transaction was to leave the corporation with indebtedness greatly in excess of its assets. Its business after such transfer was continued as before, according to the contemplation of the parties, during which time, and in October, 1906, it became indebted to plaintiff in the sum of $550.78, all without any knowledge on its part of the transfer aforesaid or of the fact that sufficient stock had not been subscribed to give the corporation legal capacity to transact business without incurring personal liability of its stockholders. *Smith* did not intend to act in fraud of creditors of the corporation, past or future, but his conduct resulted in placing an ostensibly solvent concern before the public which was in fact insolvent. It failed November 1, 1906, with liabilities of some six times its assets.

Upon such facts the court held that the purchase, in form by the corporation, of the fifteen shares of stock was fraudulent as to plaintiff, rendering *Smith,* notwithstanding such purchase, a stockholder as to the claims in suit. Judgment was therefore awarded against *Smith* and Cloud as claimed in the complaint, and against C. K. Stephens, who became a stockholder prior to the accruing of the indebtedness of $550.75, for that amount, and against all for costs. *Smith* appealed.

G. O. Linderman, attorney, and *S. M. Marsh,* of counsel, for the appellant.

For the respondent there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

The following opinion was filed October 26, 1909:

MARSHALL, J. The ground, in the main, upon which the trial court decided that plaintiff was entitled to recover, is that a corporation cannot, lawfully, under any circumstances, buy in its own stock, paying therefor by assets of the company. It may be that this states too broadly the learned circuit court's view of the law, but it is warranted, it is thought, by the language of the decision, and is certainly warranted by the argument of counsel for respondent in support of the judgment, citing authorities from foreign jurisdictions, supposed to directly, or inferentially, so hold, and deducing, by construction, the same doctrine from our statutes, and criticising decisions of this court, so far as they directly or substantially hold otherwise.

True, under some circumstances, a purchase by a corporation of its own stock would be a fraud on stockholders, and under other circumstances a fraud on present or future creditors, and so void or voidable at the instance of one or more of them in an appropriate judicial proceeding, though the circumstances under which such a transaction may be impeached by future creditors must be quite special. So much so that it is often found stated, generally, by text-writers that, in case a corporation buys in some of its own stock, a subsequent creditor cannot complain. 1 Cook, Corp. (5th ed.) § 311.

By a long line of decisions here, in the absence of a plain statutory prohibition to the contrary, and we have none, or such prohibition in the articles of organization of the corporation, a corporation may, in general, so long as it acts in good faith by authorization of its governing body, lawfully purchase its own stock, either as to stockholders or present or future creditors, and without such authorization its officers may, acting in good faith, do so as regards consenting stock-

holders or such creditors. The court spoke decisively on the subject in *Shoemaker v. Washburn L. Co.* 97 Wis. 585, 594, 73 N. W. 333; *Calteaux v. Mueller,* 102 Wis. 525, 78 N. W. 1082; *Marvin v. Anderson,* 111 Wis. 387, 87 N. W. 226; *Pabst v. Goodrich,* 133 Wis. 43, 113 N. W. 398, and *Gilchrist v. Highfield,* 140 Wis. 476, 123 N. W. 102.

While it must be conceded that the common law of England and the judicial rule in a number of states is contrary to the foregoing, it has support in the decisions of many state and federal courts, significant among them being *Dupee v. Boston W. P. Co.* 114 Mass. 37; *Leland v. Hayden,* 102 Mass. 542; *Tuttle v. Batchelder & L. Co.* 170 Mass. 315, 49 N. E. 640; *Republic L. Ins. Co. v. Swigert,* 135 Ill. 150, 25 N. E. 680; *First Nat. Bank v. Peoria W. Co.* 191 Ill. 128, 60 N. E. 859; *Blalock v. Kernersville Mfg. Co.* 110 N. C. 99, 14 S. E. 501; *Fremont C. Mfg. Co. v. Thomsen,* 65 Neb. 370, 91 N. W. 376; *Rollins v. Shaver W. & C. Co.* 80 Iowa, 380, 45 N. W. 1037; *West v. Averill G. Co.* 109 Iowa, 488, 80 N. W. 555; *Eggmann v. Blanke,* 40 Mo. App. 318; *City Bank v. Bruce,* 17 N. Y. 507; *Strong v. Brooklyn C. T. R. Co.* 93 N. Y. 426; *Taylor v. Miami E. Co.* 6 Ohio, 176; *Lowe v. Pioneer T. Co.* 70 Fed. 646; *First Nat. Bank v. Salem C. F. M. Co.* 39 Fed. 89.

The doctrine here stated is said by the federal court in *First Nat. Bank v. Salem C. F. M. Co., supra,* to be well settled in the United States.

Many cases cited by text-book writers as following the English rule will be found on examination to be based on the fraudulent nature of the transaction involved, not want of corporate power. Many other cases cited will be found grounded on the general doctrine that all assets of a corporation, whether a going institution or not, constitute a trust fund for creditors, which has no support in this jurisdiction. *Hinz v. Van Dusen,* 95 Wis. 503, 70 N. W. 657; *Slack v. Northwestern Nat. Bank,* 103 Wis. 57, 79 N. W. 51; *Marvin v. Anderson,* 111 Wis. 387, 87 N. W. 226.

In general, where the doctrine heretofore here declared, as stated, and now approved obtains, it is held that, in case an insolvent corporation buys its own stock, or the effect of such a purchase is to render it insolvent, the transaction is void as to existing creditors. *German Sav. Bank v. Wulfekuhler,* 19 Kan. 60; *Clapp v. Peterson,* 104 Ill. 26; *Butler P. Co. v. Robbins,* 151 Ill. 588, 38 N. E. 153; *Currier v. Lebanon S. Co.* 56 N. H. 262; *Alexander v. Relfe,* 74 Mo. 495; *Hamor v. Taylor-Rice E. Co.* 84 Fed. 392; *Augsburg L. & I. Co. v. Pepper,* 95 Va. 92, 27 S. E. 807. So far as such decisions are grounded solely on the trust-fund doctrine alone, as applied in some jurisdictions to a going corporation, they might not apply here. Such doctrine does not rule this case, inasmuch as the corporation at the time of the transaction in question was a going concern and it satisfactorily appears that the purpose of the controlling power left in the organization was that it should continue in business as before, indefinitely, and there was no actual intent to defraud.

Counsel for respondent argue that the transaction in question, upon legal principles in general on the subject of remediable fraud upon the rights of creditors, was voidable at respondent's election, and that bringing the action constituted such an election; that though there was no actual intent to hinder or delay, effectually or otherwise, existing or future creditors, such was the necessary effect of what occurred, which is equivalent to actual fraud. The court concurs in that view as applied to the facts of this case.

The facts found in the light of the evidence indicate, pretty clearly, that appellant *Smith* must have known, if he paid reasonable attention to the matter when he received the greater proportion of the assets of the corporation in exchange for his stock, contemplating that the company would continue to do business notwithstanding its impoverished condition, that suspension was quite liable to occur, resulting in creditors suffering loss. What he ought to have known under the circumstances he must be held chargeable with having known, and

the natural and probable effect of the conditions, of which he must be held to have had at least constructive knowledge, he must be held to have intended, and the corporation to have intended as well. If this goes further than the general rule as to transactions in fraud of present and future creditors it seems that the doctrine is a just one and a necessary limitation upon the right of a corporation and its stockholders to deplete its assets by exchanging the latter for its corporate stock, in order to prevent such right being exercised in a manner highly prejudicial to the public.

A transaction, as in this case, where, by treaty, the corporation is at once changed from a solvent to an insolvent concern, to the manifest advantage of a stockholder over existing creditors, the parties concerned contemplating that it may and probably will incur other indebtedness, while having the semblance of solvency as before, should be regarded, as to all creditors prejudiced thereby, characterized by bad faith and so as not having the essential necessary to uphold it under the decisions of this court to which we have referred. In other words, a purchase by a corporation of its own stock, known by the parties to the transaction, or which ought to be known by them, to render it insolvent, is not a purchase in good faith as to existing creditors and not such as to future creditors if the parties to the transaction contemplate that the corporation will continue to do business and incur indebtedness, as before, on the faith of its previously supposed solvency continuing. In such a case the stockholder surrendering his stock is to be regarded as having acted fraudulently, at least constructively, as to existing creditors and subsequent creditors as well, and held, as to the latter, estopped by his conduct from denying his continuance as a stockholder so far as such denial to effect would prejudice such creditors trusting the corporation upon the appearance of solvency, and such continuance is necessary to liability to the corporation for the benefit of creditors or to statutory liability to them.

We are not unmindful that the rule, in general, as to avoidance of a transfer of property in fraud of future creditors applies only in case of actual intent to defraud them. *Sommermeyer v. Schwartz,* 89 Wis. 66, 71, 61 N. W. 311; *Case v. Phelps,* 39 N. Y. 164. That rule as stated is out of harmony with some adjudications, but is supported by the great weight of authority under statutes similar to our sec. 2320, Stats. (1898), as indicated by the text in 1 Moore on Fraudulent Conveyances at page 191 and authorities cited in note 23, and Bump on Fraudulent Conveyances (4th ed.) § 292, and cases cited. It is too restrictive, as generally stated, to apply to the situation we have here, and should, it is thought, be extended to include it, upon the theory that the duty of a stockholder not to deplete for his advantage corporate assets below the subscribed capital and become a party to a continuance of solvent appearance supplies the need for actual intent to defraud, where the natural and probable effect is to prejudice persons subsequently dealing with the corporation as solvent; condemning the transaction for want of that good faith necessary to sustain a purchase by a corporation of its stock,—while at the same time, so far as necessary to fully protect the rights of creditors, the doctrine of estoppel applies to prevent the stockholder from claiming, to effect, that his relations as such holder were terminated by such transaction.

Counsel for appellant contend that, since this action is grounded on the statutory liability of stockholders to creditors of a corporation whose credits accrue in the course of its business transactions in violation of sec. 1773, Stats. (1898), limiting such liability as to obligations thus incurred to the signers of the articles "and the subscriber or subscribers for stock transacting such business or authorizing the same, or having knowledge thereof, consenting to the incurring of the" liability "as well as the stockholders then existing," that there was no liability of *Smith* here, except upon the first cause of action, because his transfer of stock must be held to have ter-

minated his relations to the corporation as a stockholder, till such transfer shall have been set aside by some judicial determination. That is wrong for several reasons: *First,* respondent was entitled to the benefit of the law of estoppel to bar the claim of severance of such relations; *second,* the transaction was void at law, under the circumstances, by force of sec. 2320, Stats. (1898); *third,* where a transaction is voidable as to creditors and they do not need the use of equity jurisdiction to remove a cloud on title or for an accounting or some other relief within the peculiar field of such jurisdiction, they may treat it as a nullity and proceed at law as if such transaction had never occurred. Of the latter the following are illustrations: *Bates v. Simmons,* 62 Wis. 69, 22 N. W. 335; *First Nat. Bank v. Knowles,* 67 Wis. 373, 28 N. W. 225; *Leslie v. Keepers,* 68 Wis. 123, 31 N. W. 486.

In the last case cited an accord and satisfaction, in form, pleaded as matter of defense to an action on the original claim, was met by proof, under objection, that the settlement was obtained by fraud. It was contended on appeal that the settlement could only be avoided in equity. The decision of the court was otherwise.

Counsel for appellant misapprehend the nature of this action, in making the assertion that it is to set aside the purchase of the stock as fraudulent, and misapprehend the law in supposing that such an action is necessary in order to charge *Smith* with statutory liability. The action is against him upon the theory that, as to plaintiff, the stock was never transferred, just as in *Leslie v. Keepers, supra,* the action was commenced upon the theory that no accord and satisfaction had occurred except one effectually avoidable at plaintiff's election and that the commencement of the action was a sufficient election, the circumstances of the transaction not requiring any restoration as a condition of recovery.

What has been said sufficiently, it is thought, deals with all objections advanced to the judgment and all reasons given by

counsel for its affirmance to indicate that, although the major ground for the judgment stated in the circuit court's decision and urged upon our attention in support thereof cannot be approved, it is right and must be affirmed.

By the Court.—So ordered.

TIMLIN, J. (*concurring*). In addition to the ground for affirmance consisting of constructive fraud upon future creditors in the transaction by which it is claimed *Smith* ceased to be a stockholder prior to the incurring of the debt in question, I desire to rest my concurrence also upon another ground going to lack of power in the embryo corporation to purchase in its own shares and so release from that status the persons who had theretofore become shareholders. The corporation never had fifty per centum of its capital stock subscribed, consequently there could be no first meeting, no directors, and no officers; but the signers of the articles of incorporation were by law intrusted with the direction of the affairs of the corporation. Sec. 1773, Stats. (1898), as amended by ch. 507, Laws of 1905. The signers of the articles did not, for the corporation, buy in *Smith's* shares. Who else at this stage had authority to represent the corporation for this purpose? *Walters v. Porter,* 3 Ga. App. 73, 59 S. E. 452. If the corporation was not represented in the transaction, how could the transfer have any effect whatever? Is the corporation, even through the signers of its articles, at this stage of its existence, empowered to dispose of its assets to a shareholder in purchase of his shares? I think not. The following sections of the statute may be of interest in connection with these queries: Secs. 1774, 1775, 1776, 1767, 1751.

A motion for a rehearing was denied February 1, 1910.

McGowan, Appellant, vs. Paul and others, Respondents.

October 8, 1909—February 1, 1910.

Towns: Powers: Sidewalks and street lighting: Contracts: Tax levy: Restraining unauthorized expenditure: Taxpayer's action.

1. A town has no power to raise money by general taxation to build sidewalks and light public streets in an unincorporated village within its boundaries.
2. One taxpayer may maintain an action in behalf of all taxpayers even though, by reason of an estoppel, he has for himself alone no equitable ground of complaint.
3. The expenditure of moneys raised by a tax levy upon property generally in a town for the unauthorized purpose of building sidewalks and lighting streets, pursuant to contracts theretofore made, in an unincorporated village within the town, will be restrained in an action brought by one taxpayer in behalf of all, even though all except the plaintiff have indicated their consent to the levy by voluntarily paying the tax pending the suit. The doctrine of equitable estoppel is inapplicable to such a case because the town had no power whatever to make the contracts or levy the tax complained of. *Babcock v. Fond du Lac*, 58 Wis. 230, distinguished. MARSHALL, J., doubts.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Taxpayer's action to restrain the officers of a town, in which is located an unincorporated village, from carrying out a sidewalk and a street-lighting contract.

These facts were established, as stated in the trial court's decision, in addition to such as appertain to the capacity of plaintiff to maintain the suit and of defendants to be parties: The town of Milton, in Rock county, contains the unincorporated village of Milton Junction. Such village is a railroad center, and the condition of things is such as to render sidewalks, as contemplated by the sidewalk contract, and street lights, as contemplated by the contract on that subject, reasonably necessary for the safety of pedestrians using the public ways. April 5, 1904, at the annual town meeting, a reso-

lution was adopted by the electors in favor of putting in good cement sidewalks on streets where abutting property owners were willing to pay one half the expense, and to levy a tax therefor not to exceed $1,000 in any one year. At the annual town meeting of 1905, the amount was reduced to $800. At the annual town meeting of 1907, a further attempt to reduce the amount failed. Taxes were accordingly levied for 1904, 1905, and 1906 and collected for the special purpose of defraying the expense of sidewalks. April 2, 1907, there was in the special fund $275.46. It had been customary for several years to maintain street lights in the village at public expense, money being raised by taxation for that purpose without objection by any one. For such purpose, at the annual town meeting in 1907, $179 was voted. Also $200 was voted to be used to purchase a stone crusher. Thereafter defendants, officers of the town, as such, contracted with B. P. Crossman to build cement sidewalks, where designated by them, at a stipulated price, one half to be paid by the town and one half by the owners of abutting property, the walks to be built where such owners were willing to be so burdened. Crossman was carrying out such contract when this action was commenced. There was then due him $385.45. April 2, 1907, said officers, as such, contracted with Harry Hayes and William Doran for street lighting, which contract was also being carried out when this action was commenced. After such commencement, it being claimed that the tax levy for the special purposes had not been properly made for 1907, due proceedings were had at a special meeting to that end, and for the expenditure of the balance of $279 left over as aforesaid; also for raising $200 for the construction of crosswalks. At the same time, the transactions of officers for 1907 as to such matters, up to the date of the meeting, were approved. Plaintiff had knowledge of the methods pursued by the town, as aforesaid, from year to year, and the making of the sidewalk contract and doing the work and furnishing the material there-

under, and not only made no objection during the time the expenses were being incurred, but participated therein by furnishing oil for street lamps and obtaining from the town pay therefor. The taxes voted for 1907, as aforesaid, were levied and raised after this action was commenced, all taxpayers paying voluntarily, except plaintiff, who paid his tax under protest, amounting to $3 for sidewalks and less than $1 for street lamps. He filed a claim against the town for a return thereof. The action was commenced because of personal differences between him and the town officers. All transactions in respect to the contracts were had in good faith, and were within the discretion vested in town officers by action of the electors at the town meeting. Judgment was awarded dismissing the complaint with costs.

L. E. Gettle, for the appellant.

For the respondents there was a brief by *Jeffris, Mouat, Smith & Avery* and *John Cunningham,* and oral argument by *Mr. M. O. Mouat* and *Mr. Cunningham.*

The following opinion was filed November 12, 1909:

PER CURIAM. The trial court seems to have supposed it was competent for a town to, by general taxation, pay for building side and cross walks and lighting public streets in an unincorporated village within its boundaries. Counsel for respondent now so maintain, supporting that view by referring to the general authority of towns as to bridges and highways and making contracts to effectuate their corporate powers.

The general scheme of town government is to divide the territory into districts and, in the main, put the burden of maintaining highways in each upon the taxable property therein. In view of that, pretty plain language would be required in a statute to effectively show a legislative intent to burden the property of a town, generally, as claimed by respondent's counsel.

As an original matter, it would seem quite unreasonable to do such work as that in question at the expense of taxpayers of a town, generally, necessarily including many persons not benefited at all by the expenditure. Therefore, power to do so cannot be implied from general language respecting the subject of highways, which in the executory features does not so contemplate.

That the legislature did not purpose creating any such power as that contended for, is quite plainly indicated by the fact that it adopted a complete system in relation to the subject, by resorting solely to local taxation for the particular local purpose, in harmony with the general scheme of town government. Such system is found in secs. 1243, 1346*a*, 1346*b*, and 819, Stats. (1898). In so industriously providing for such local matters, it is the opinion of the court that it was intended to make the plan exclusive.

There being no legislative authority for the taxes, or the expenditure of money raised by general taxation, for the purposes in question, it follows that the contracts, the validity of which was challenged, were void, and the levy, impending when the action was commenced and thereafter made, was without legal authority.

Thus the basic reason upon which the learned circuit court's decision is grounded is fallacious. It is thought that, had the court not supposed the town possessed the power which it attempted to exercise, and that the difficulty lay in mere irregular, or, at most, jurisdictionally defective, execution of the power, the conclusion would not have been reached that appellant's complaint was without equity.

True, the situation confronting the taxpayers of the town at the time the action was commenced was one they had submitted and been parties to for three years, and, for aught that appears, all, except the one who invoked judicial aid in behalf of all, to put a stop to the practice, were willing to have it continue. There is some reason to claim, from the general

payment of the taxes pending the litigation, that they thereby repudiated the attempt, in their behalf, to prevent an accumulation and expenditure of funds as before.

Under the peculiar circumstances stated, had general taxpayers any standing in a court of equity, when this action was commenced, to obtain the relief sought, or, if they had, did they not supersede it by paying the taxes pending the action?

It would not militate against maintenance of the action that the actor in commencing the litigation did not have an equitable ground for complaint, for himself alone, if such were the fact, since he was of the general class who were pecuniarily interested in conserving the public funds. *Cawker v. Milwaukee,* 133 Wis. 35, 113 N. W. 417. That is upon the theory that, while an individual taxpayer may be estopped by his conduct from successfully appealing to equity jurisdiction for relief against a threatened unlawful levy of taxes, or one imposed, or a threatened illegal expenditure of public funds, he is not, when acting for all taxpayers, since all may not be affected by the equitable estoppel.

Now it may be conceded, for the purposes of the case, that, when the contracts were made and the contractors commenced incurring expense under the same, and the levy of the tax to pay therefor was only impending, all taxpayers, including the one who later became active in hostility thereto, must have known of the facts; and that no person raised his voice in opposition, but the particular one, and that all, except such particular one, indicated consent in the matter after the litigation commenced, so far as payment of the taxes and keeping silent would so indicate. Nevertheless, had the taxpayers, when the action was commenced and thereafter, the right to equitable interference to stop the levy of the tax or expenditure of the proceeds of the levy?

In dealing with the subject in hand, the court must give significance to the fact that the difficulty with the situation, complained of, was not in there being a mere irregular execution

of a power, after jurisdiction obtained in that regard, leaving only mere details to be worked out, as to which there was failure so great as to be fatal to the levy, if it were seasonably challenged, but not otherwise, as in *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208, 77 N. W. 167.

The doctrine of that case, so confidently relied on by respondent's counsel, and probably by the court below, does not apply if it is to be restricted to such situations as were there dealt with. In that instance, there was power and jurisdiction obtained to execute it, but failure to observe the statutory regulations as to details, and performance of the work with knowledge of the plaintiff, he being benefited thereby.

In *Jorgenson v. Superior,* 111 Wis. 561, 87 N. W. 565, the court refused to apply the doctrine of estoppel, as in the *Schintgen Case,* because, though there was municipal power, the jurisdictional steps requisite to its effective activity were not taken. Referring to the *Schintgen Case* the court said:

Such cases "are all or nearly all based upon the fact that the municipality doing the act had jurisdiction to do the act done, and was acting within the limits thereof, although informally. When the act done is without jurisdiction or authority, few if any of the cases recognize or enforce an estoppel."

Adding, as to the case in hand: "In this case the act of the city was wholly without authority." Elements of estoppel there existed quite as significantly as in the present instance.

Babcock v. Fond du Lac, 58 Wis. 230, 16 N. W. 625, has attracted attention, as having some similarity to this case, and as leaning to the side of respondent. It was a taxpayer's action to prevent payment of money, raised by taxation, voluntarily contributed by all taxpayers, on a contract upon the ground that the indebtedness created thereby was beyond the constitutional limitation, and hence the contract and the levy were absolutely void. The action was not commenced till after the fund to discharge the contract had been accumulated

by the voluntary payments. The defendant prevailed upon the ground that, all taxpayers having voluntarily paid their taxes, no one had any equitable or legal ground for preventing the fund from being used for the purpose it was raised, regardless of the void character of the contract and the tax.

It is the opinion of the court that the *Babcock Case* is widely distinguishable from this one, in that the purpose of the contract was within the municipal power. Authority to use the power, in the manner attempted, was dormant because of the constitutional limitation upon municipal indebtedness. Ample power to levy a tax, for the purpose of defraying the expense of the things contemplated by the contract, existed. Had taxes been levied and money accumulated in anticipation of a future liability in that regard, they would have been free from infirmity. So the case is in harmony with *Jorgenson v. Superior, supra.*

Here there was no power to levy the tax or make the contracts complained of. The difficulty was greater than a jurisdictionally defective execution, as to details, of an existing power, after having obtained jurisdiction to use the power, as in the *Jorgenson Case,* or, than want of jurisdiction at all to use an existing power, as in the *Babcock Case.* There is no basis whatever for the practice sought to be restrained. The infirmity was so great as to render all the proceedings clear usurpations. So under the rule of the *Jorgenson Case* there was nothing in the conduct of the taxpayers militating against their interfering, to effect, with execution of the void contracts, at least so long as the fund depended on was under public control, as was held in somewhat similar circumstances in *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798.

It seems well to notice the claim that a court of equity should not, in any case, interpose to prevent the imposition of a threatened levy of taxes and prevent incurring indebtedness on the faith of such levy, citing *Judd v. Fox Lake,* 28 Wis. 583; *Sage v. Fifield,* 68 Wis. 546, 32 N. W. 629; and *Harley v. Lindemann,* 129 Wis. 514, 109 N. W. 570.

Whether all said in such cases is entirely consistent with *Peck v. School Dist.* 21 Wis. 516; *Bay L. & I. Co. v. Washburn,* 79 Wis. 423, 48 N. W. 492; *Cawker v. Milwaukee,* 133 Wis. 35, 113 N. W. 417, and similar cases, we need not stop now to discuss. It is sufficient to say that in case of one of the purposes of the action, as here, being to prevent, on the ground of illegality, incurring indebtedness or disbursing of public funds for an illegal purpose, the doctrine of *Peck v. School Dist., supra,* as to competency of a court of equity to interfere at the suit of a taxpayer, has been uniformly sustained. In *Judd v. Fox Lake, supra,* which was followed in *Sage v. Fifield, supra,* and *Harley v. Lindemann, supra,* the distinction was pointed out between mere threats by public officers to do acts, which if done would be injurious to taxpayers, and acts already done, such as the making of an illegal contract in contemplation of collecting taxes or of disbursing moneys on hand in execution of it. This case belongs to the latter class.

The judgment is reversed, and the cause remanded with directions to render judgment declaring the contracts void and the levy of taxes and collection of the same for the purposes contemplated by such contracts illegal, and enjoining the town officers from issuing orders upon the town treasury for payment of any money upon such contracts, and enjoining the disbursement upon such contracts of any money in the town treasury collected by general taxation.

The following opinion was filed November 18, 1909:

MARSHALL, J. (*doubting*). That the decision of the court is right, if it is right in all cases to follow technically applied principles as fenced about by the facts of precedents, I concede. I do not doubt but that the court has heretofore not gone further in the application of the doctrine of equitable estoppel, than is indicated in the opinion; but can it not go further? Can it not go as far as the boundaries of the prin-

ciple itself, which has always and should always distinguish the administration of justice; thus demonstrating, as far as practicable, that the end sought in judicial administration, above all things, is to give the broadest and most efficient effect possible to those principles of justice, evolved through the wisdom of ages, rather than stop at mere precedents which, applied arbitrarily, as if they, instead of the principles upon which they are grounded, should govern; give to the application the cast of mere technicality. The answer to that, seemingly, has often been authoritatively given by this court in words to the effect that, principles antedate and are paramount to precedents. The latter merely follow the former; do not control them; the controlling force is in the former. Given a state of facts within the principle, suggesting that the attainment of justice requires a new application, then the court should not stop before reaching the legitimate goal, for want of a precedent, but a new one should be made, thus illustrating the crowning dignity of the law as a science; the fundamental principles of justice.

As we said, by sanction of the court on another occasion, giving point thereto by judicial action creating a most important precedent:

"There is no vitality in precedents; there is in rules. They are susceptible of expansion along every line necessary to reach new conditions. In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice where legal remedies are infirm. Precedents will be a constant guide, but never a bar. Where a new condition exists, and legal remedies are inadequate or none are afforded at all, the never-failing capacity of equity to adapt itself to all situations will be found equal to the case. extending old principles, if necessary, not adopting new ones, for that purpose." *Harrigan v. Gilchrist,* 121 Wis. 127, 235, 99 N. W. 909, 936.

A failure, perhaps, to give to the doctrine stated its proper dignity and activity, renders the judicial development of the

law, in some fields, so slow as to impress the people that it has stopped altogether unregardful of the fact that the everchanging conditions of society render such development reasonably necessary in order to render our common-law adaptable to the new situations, resulting in such impatience and revolt as to stimulate, to effect, legislative coercion, sometimes possibly beyond constitutional limitations, and often in such disturbance of judicial inertia as to result in confusion and uncertainty, requiring much time and energy to render again plain the legal pathway for bench and bar.

In this case the learned circuit court, doubtless, thought to grasp and appreciate the principles ruling the cases cited in the court's opinion, and, with the true dignity of the chancellor, to apply them to the facts in hand, without hesitation, merely because the result might be a new precedent.

Such exhibitions of judicial learning and courage give to trial courts distinction, instead of furnishing ground for severe, if any, criticism.

Did not the learned circuit court judge rightly in respect to the basic thought in *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208, 77 N. E. 167? Is not such thought this: If a person keeps silent in respect to a thing which is being done by another, in good faith relying upon its being by legitimate public authority, such person having knowledge of the facts, and by his attitude giving such other reasonable ground to suppose that if he had legal ground to object he would do so, and not doing so he has none, or if he has any he chooses to waive it, and so relying, such a condition is created that, if such person were allowed to change his position and successfully insist upon his legal rights it would be to his gain and such other's loss, equity will not aid him to secure such advantage; one of the plainest, most commonly applied principles of equitable estoppel; one which, stated abstractly, is that, he who keeps silent when he ought to speak shall not be heard by the ear of equity if, after so keeping silent, he does

speak. If I rightly read *State ex rel. Schintgen v. La Crosse, supra,* such is the case. The court there declared, in about so many words, that it merely applied the ordinary doctrine of estoppel and that such doctrine was applicable because the facts were within the principle of it. True, there was power to do the act and jurisdiction obtained to exercise the power and merely jurisdictional infirmity as to details in such exercise, as said in the court's opinion, but the fact of there being the preliminary power and legitimate initiative was not stated as a ground of the decision, they being treated as mere circumstances, among others, complete in themselves, calling for use of the estoppel. The cases cited to support the opinion, if I read them rightly, show that the mere fact that the particular thing attempted might have been done in an effective way, was not the turning point, but fatal laches was and nothing else. That is most significantly illustrated by *Penn Mut. L. Ins. Co. v. Austin,* 168 U. S. 685, 18 Sup. Ct. 223. Here is the gist of the matter, stated in the language of Mr. Justice WHITE:

"The reason upon which the rule is based is . . . where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect. . . . The requirement of diligence, and the loss of the right to invoke the arm of a court of equity in a case of laches, is particularly applicable where the subject matter of the controversy is a public work."

Now, though the court refused to apply the doctrine of the *Schintgen Case,* when it came to *Jorgenson v. Superior,* 111 Wis. 561, 87 N. W. 565, it was in my judgment for the very poor reason that the cases were unlike in their facts, in that jurisdictional initiative existed in the former but not in the latter. All the elements of an equitable estoppel, according to the logic of the *Schintgen Case* and that of the federal case,

existed in the latter instance, and do here, as significantly as in the first. The court merely ran the course of the precedents, as was supposed, and refused to go further, though it seems the facts appealed as strongly to the forum of conscience in the one case as in the other.

In *Babcock v. Fond du Lac,* 58 Wis. 230, 16 N. W. 625, was not the real principle applied the same as we suggest ruled *State ex rel. Schintgen v. La Crosse, supra,* and the still more moderate doctrine of mere acquiescence? The fact that there was municipal power to do the thing sought to be done, under proper conditions, but that power to do so by the creation of an indebtedness was dormant, as stated in the opinion, was not suggested. Can it be wrong to assert that the real mainspring of the decision was that there had been universal acquiescence in the levy and payment of the tax with knowledge of the facts, and silence as to the contract during the progress of the work under it, with like knowledge, and on those accounts and those only, that no taxpayer could successfully sue at law to recover back his contribution, or in equity to interfere with the use of the fund for the purpose for which it was accumulated by the voluntary payments, although the contract and all the proceedings, resulting in the fund being in the treasury, were absolutely void.

It was said in the *Babcock Case* that the fund having been, by universal acquiescence, accumulated for a particular purpose, there was no equitable consideration why the court should interfere to prevent the money being used therefor; that it having been so contributed for a particular purpose, it could not be used for any other, and judicial interference could not be of any possible benefit to taxpayers, since the voluntary payments could not be by such means restored. "Such interposition," said the court, "would not give restitution, nor prevent any injury, nor secure any right, nor redress any wrong. It would merely prevent a benefit to another at the instance of one who has voluntarily precluded himself

from all interest and benefit in the sum sought to be controlled."

To fully appreciate the *Babcock Case* it must be understood that it was a taxpayer's action, the same as this, and there was no legitimate basis whatever for the tax. The case went wholly on the broad doctrine of equitable estoppel. That this case is within the principle of it I may safely assert. That the principle should be applied and a new precedent be made, if necessary, rather than relief be denied because such principle has not been heretofore extended to such precise conditions, may well be insisted on. Such extension of it by the learned circuit court, as occurred, seems most logical.

A motion for a rehearing was denied February 1, 1910.

STATE EX REL. GREEN BAY GAS & ELECTRIC COMPANY, Appellant, vs. MINAHAN BUILDING COMPANY, Respondent.

October 26, 1909—February 1, 1910.

Quo warranto: *Action against corporation: Pleading: Alleging corporate existence: Statute construed: Who may maintain action: "Private party."*

1. In an action of *quo warranto*, brought under sec. 3466, Stats. (1898), to oust the defendant from the exercise of a franchise under a pretended city ordinance, a complaint alleging that defendant "is a pretended corporation purporting to have been organized on the 11th day of February, 1907, having its location and place of business in the city of Green Bay;" that acting under pretended authority purported to be conferred by the articles of incorporation and its charter it has assumed to act as a corporation duly organized; that so acting it procured the passage of an ordinance by the city of Green Bay conferring a franchise upon it; that it accepted said pretended ordinance and pretended franchise, and claims to have the right and authority

conferred thereby; and that such ordinance and franchise are void,—is insufficient because it does not aver that defendant is a corporation, as required by sec. 3205, Stats. (1898), and does not state facts from which the court can find that it is a corporation. MARSHALL, J., dissents.

[2. Whether a statement of facts showing corporate existence, without a direct averment thereof, would be a sufficient compliance with sec. 3205, Stats. (1898), not determined.]

3. A public utility corporation is a "private party," within the meaning of sec. 3466, Stats. (1898).

APPEAL from an order of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This is an appeal from an order sustaining a demurrer to the complaint for want of facts sufficient to constitute a cause of action. The complaint alleges substantially that the relator is a public utility corporation duly organized under the laws of Wisconsin and owning and operating a gas, electric light, and power plant, having its principal office in Green Bay, Wisconsin, and engaged in the business of furnishing gas and electric current for lighting, power, and other purposes to the city of Green Bay and its inhabitants, and as such is a freeholder and taxpayer in said city; that the defendant "is a pretended corporation purporting to have been organized on the 11th day of February, 1907, having its location and place of business in the city of Green Bay;" that a copy of its articles of incorporation is attached to and made a part of the complaint; that, acting under the pretended authority purported to be conferred by the articles of incorporation and its charter, it has assumed to act as a corporation duly organized and as such to purchase and own real estate in the city of Green Bay and to construct, lease, and own a six-story office and store building, and asserts its power and intention to continue so to do; that defendant, acting under said pretended authority, filed with the city clerk of the city of Green Bay an application for a franchise to construct, operate, and maintain conduits in the streets within a limited district in the

business portion of said city and to furnish to the citizens of Green Bay electric current for light and power purposes, hot water, steam, and air; that a copy of the proposed ordinance was filed with the city clerk; that such application was not published as required by law and was never published in whole or in part; that after the filing of said application and copy of ordinance with the city clerk the council changed and amended the same, and as so amended passed an ordinance granting certain rights to the defendant; that said ordinance was approved by the then mayor of the city of Green Bay, and thereafter the defendant filed with the city clerk its written acceptance of said pretended ordinance and the pretended franchise purporting to be granted thereby; that thereafter defendant installed in the basement of its office and store building an electric plant and equipments for the generation of electricity for light, power, and heat, and a plant and equipments for the production and distribution of steam, air, hot water, and other products, and began to excavate and erect in the streets trenches, conduits, wires, poles, pipes, and appliances; that defendant owns said franchise purported to be granted by said pretended ordinance, and claims to have the right and authority attempted to be conferred upon it thereby, and is using and occupying a portion of the streets and alleys thereunder; that the stockholders of defendant are the Minahan family, one of whom at the time of signing the ordinance was the mayor of the city of Green Bay and was directly and indirectly interested in the defendant company and its property, whereby said pretended ordinance and franchise was and is null and void; that the relator applied to the attorney general to bring this action against the defendant to oust it of its pretended and alleged powers and privileges; that the attorney general refused; and that the relator gave bond to the state of Wisconsin to protect it against damages and costs by reason of bringing this action, which bond was approved by the attorney general. The complaint sets out at length other

matters not material to this appeal, and concludes with the following prayer:

"Wherefore plaintiff prays that defendant be required to show cause by what authority it holds and exercises said pretended ordinance and franchise and the rights and privileges purported and attempted to be conferred thereby upon it, and that, in default of so showing cause, defendant be adjudged guilty of unlawfully holding and exercising the same, and that it be ousted and excluded therefrom, and that plaintiff recover the costs and disbursements of this action.

For the appellant there were briefs by *Greene, Fairchild, North & Parker,* and oral argument by *B. L. Parker.*

For the respondent there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

The following opinion was filed November 12, 1909:

KERWIN, J. It appears from the opinion of the trial judge sustaining the demurrer that it was sustained on the ground that the complaint does not state that the defendant is a corporation—only that it is a "pretended corporation,"—and that no other attack was made upon the complaint in the court below. The contention of the appellant here is that, since the facts are stated from which the court can determine that the defendant is a corporation, the corporate existence is sufficiently alleged to meet the calls of sec. 3205, Stats. (1898), which provides that in an action by or against a corporation the complaint must aver that the plaintiff or defendant, as the case may be, is a corporation, and, if organized under the laws of this state, that fact must be averred, and, if not so incorporated, an averment that it is a foreign corporation. In *Carpenter v. McCord L. Co.* 107 Wis. 611, 83 N. W. 764, this court sustained a demurrer to the complaint because of lack of such averment and said:

"That the appellants are intended to be sued as corporations sufficiently appears from their names. *Brauser v. New England F. Ins. Co.* 21 Wis. 506. That being so, the complaint fails to comply with the requirements of the statute."

We do not find it necessary to determine whether a statement of facts showing corporate existence would not be a sufficient compliance with the statute. Here we think the pleading falls short of direct averment of all the facts necessary to show corporate existence. On the contrary, the allegation that the defendant is a "pretended corporation" at least raises the implication that it is not a corporation. It is difficult to see how the defendant could be a "pretended corporation" and at the same time a real corporation. In other words, the allegation that defendant is a pretended corporation at least implies that it is not the thing it pretends to be.

Moreover, the complaint is wanting in full statement of all the material allegations necessary to show the creation of a valid corporation, and especially in face of the positive allegation that it is a "pretended corporation." Besides, there is no allegation that the articles of incorporation or a copy thereof duly certified as required by subd. 7, sec. 1772, Stats. (1898), was filed with the secretary of state, or that a verified copy and certificate of the secretary of state showing date when such articles were filed and accepted by the secretary of state, with the date, was left or filed with the register of deeds of the county in which said corporation is located, or that any certificate of incorporation or charter was ever issued, but merely that the defendant was acting under the "pretended authority purported to be conferred by its said articles of incorporation, and by its corporate charter defendant has assumed to act as a corporation duly organized."

It is clear from the allegations of the complaint that the plaintiff has not only failed to aver that defendant is a corporation, but has failed to allege all the facts from which the court could find that it is a corporation, and has directly alleged that it is only a pretended corporation, so on no theory has the statute requiring corporate existence to be alleged been complied with. It was necessary for plaintiff to show that some person natural or artificial was before the court as de-

fendant. No natural person has been sued and no artificial person, because the defendant does not appear to be a corporation—only a pretended corporation. We do not regard it necessary to discuss cases cited by appellant from other jurisdictions upon the question, because we agree with the court below that the case is ruled by our statute referred to and the decision of this court under it. Counsel, however, cite to our attention *State ex rel. Weinsheim v. Leischer,* 117 Wis. 475, 94 N. W. 299, as supporting their contention. But in that case it will be seen that the distinction is clearly made between an action brought against a legal corporation which has usurped franchises which it does not possess, and a case where the alleged corporation is not one in fact and the object of the action is to procure a judgment declaring it to have no legal existence. It is clear from the complaint here that the action is not brought to procure a judgment declaring that defendant has no legal existence, but because it holds and exercises a pretended ordinance and franchise and the rights attempted to be conferred. Secs. 3466, 3240, 3241, Stats. (1898); *Independent O. of F. v. United O. of F.* 94 Wis. 234, 68 N. W. 1011. Counsel for appellant in their brief state that the action is brought under sec. 3466, Stats. (1898).

It was further argued in this court that the action was not well brought because the relator is not a "private party" within the meaning of sec. 3466, Stats. (1898). While the relator may be said to be in its nature *quasi*-public because subject to supervision by the public, it is nevertheless private as regards its property rights. *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 376, 1136, 1139; *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900; *State ex rel. Vilter Mfg. Co. v. M., B. & L. G. R. Co.* 116 Wis. 142, 92 N. W. 546; *State ex rel. Northern Pac. R. Co. v. Railroad Commission,* 140 Wis. 145, 121 N. W. 919; *Interstate Comm. Comm'n v. Chicago G. W. R. Co.* 209 U. S. 108, 28 Sup. Ct. 493.

We think the plaintiff is a private party under sec. 3466, Stats. (1898), but that the complaint states no cause of action, and therefore the order below must be affirmed.

By the Court.—Order appealed from is affirmed.

MARSHALL, J. (*dissenting*). The complaint should be viewed in the light of that liberal rule, so beneficial in the administration of justice, and which distinguishes our Code system from that of the common law with its multitude of obstructing technicalities. By such rule, if the complaint "in any portion of it, or to any extent, presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially these facts may be presented, or however defective, uncertain, or redundant may be the mode of their statement." *Morse v. Gilman,* 16 Wis. 504. It "should have the support of the most liberal construction which its language will reasonably bear, and all reasonable inferences that can be drawn therefrom." "That effect should be given to all allegations of a pleading which will support rather than defeat it, if that can be done without adding thereto, by way of construction, material words not necessarily implied, or giving to the language used a meaning that cannot be reasonably attributed to it." "Every pleading is to be so construed as to support the purposes of the pleader to state a cause of action, if the facts essential thereto can be found expressly stated or alleged by reasonable inference. . . ." *Emerson v. Nash,* 124 Wis. 369, 380, 381, 102 N. W. 921, 926. Again, "if sufficiency can be discovered, reasonably, by judicial construction of the language used and by reasonable inferences from general allegations," that is sufficient. *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 427, 84 N. W. 159, 162.

The foregoing are but a few of the many significant illustrations of the great, and by no means too great, length to which the Code rule has been extended. It is no longer suffi-

cient to condemn a pleading, that the pleader failed to state definitely a cause of action, or even failed utterly, to state the precise cause of action he intended. If he states sufficient—viewing the language used as broadly as practicable within reason and looking at all facts stated expressly, construing the words most favorably to the pleader, and those fairly suggested to exist by reasonable inference—for a cause of action within the jurisdiction of the court as between the parties to the litigation, that is sufficient on general demurrer.

The following are additional illustrations, going, perhaps, beyond what is necessary for the purpose of this case: Where a fact is alleged to have been duly done, all things essential to the efficiency of the thing expressly stated are to be deemed by reasonable inference to be also alleged to have occurred. *Lehr v. Murphy,* 136 Wis. 92, 98, 116 N. W. 893. Where a particular intent is necessary to make out an actionable wrong, a statement of acts, suggesting, reasonably, that the purpose thereof was to accomplish such essential, is sufficient. *Klipstein v. Raschein,* 117 Wis. 248, 250, 251, 94 N. W. 63. Where, from the general scope of a complaint, it shows that the right sought to be vindicated is of a public character so that the plaintiff might properly maintain a general bill on behalf of himself and all persons similarly interested, the complaint should be sustained as of that character, reading out of it, by reasonable inference, the ordinary allegation on the subject, even if such allegation is entirely omitted from the pleading and plaintiff does not, by the title, suggest that it is brought otherwise than for himself. *Cawker v. Milwaukee,* 133 Wis. 35, 113 N. W. 419.

The question here is, Does the complaint allege, sufficiently, that defendant is a corporation? The statute makes such a statement obligatory. Sec. 3205, Stats. (1898). This court in *Carpenter v. McCord L. Co.* 107 Wis. 611, 618, 83 N. W. 764,—while conceding that whether a failure to so allege, in the circumstances of such a case as this, can be raised by a

general demurrer, is in much confusion in New York, from which the statute was borrowed, and had not been decided here prior to 1890, although the statute was then twenty years old,—decided that it was best to hold substantially to the letter of the statute. The change in the statute to its present form was made on the suggestion of the revisers in 1878. It consists of a substantial adoption of the New York statute. (See Revisers' Note to section.) Prior thereto the mere designation of the party by a name suggesting corporate existence was sufficient. *Brauser v. New England F. Ins. Co.* 21 Wis. 506. The change was made solely to render certain the purpose of the pleader instead of leaving it in any uncertainty.

The history emphasizes the rule requiring a broad reasonable construction of a pleading as to the particular matter in hand. That is, the purpose of the statute being to deal merely with matters of certainty which, ordinarily, are corrected on motion, there should be uncertainty so great that, after resolving all reasonable doubts in favor of the pleading, we cannot yet read out of it a statement of corporate existence, before condemning it on general demurrer, following the rule in the *Carpenter Case.* The statute does not require the averment of corporate existence to be in any particular words. If it is reasonably in the pleading at all, that is sufficient.

Now keeping the foregoing prominently in view, let us briefly examine the pleading.

The name of the defendant in the title suggests corporate existence, as before indicated. That is not without significance. While we must now find such existence in the averments, instead of in the title, the latter throws some light upon the former as regards what is reasonably inferable therefrom. It is as true now as when the *Brauser Case* was decided that the name, *prima facie,* shows that the defendant is in fact a corporation. Were it not for the statute requiring something more than a *prima facie* showing, that would be sufficient.

The second significant circumstance, shown by the pleading,

is that the action was not brought to judicially destroy an existing corporation, since such an action is only proper by leave of this court. Sec. 3241, Stats. (1898). It was brought. clearly, as counsel for appellant suggest, under sec. 3466, Stats. (1898). So it is easily inferable from the pleading that defendant is a person (and as such consistent with the name, necessarily, a corporation), unlawfully exercising a franchise, and referable to subd. 1, or an association or number of persons acting as a corporation without having been duly incorporated, and referable to subd. 3. By reference to the title it is much more reasonable to infer that it is under the former than the latter. The general purpose, quite apparent, as is suggested in the court's opinion, is to prevent the defendant from exercising a franchise granted to it by the city, instead of the franchise to be a corporation, granted by the state direct. That gives much weight to the stated preferable inference.

The third significant circumstance is, that the defendant is alleged to be located at Green Bay, in this state. It could have no such location, in a legal sense, unless whatever there is of corporate existence be referable to the laws of this state; in other words, unless, if it be a corporation at all, it is at least a *de facto* domestic corporation. That is made plain by the fact that the defendant is referred to, over and over again, as if it were at least a *de facto* corporation, and as having articles of organization *and a "corporate charter,"* and a copy of the articles of incorporation is made part of the complaint, indicating compliance with the statutes of this state.

The fourth significant circumstance, appearing in the pleading, is that, as stated, the defendant is alleged to have a "corporate charter," separate and distinct from its articles of incorporation, and that the word "pretended," though used adjectively as to the articles and corporate existence, is not as to such charter.

Now since the words "corporate charter," plainly, do not

refer to "the articles of incorporation," they must point to some final instrument which may, by itself, or with the articles, be dignified by the characterization "corporate charter."

Sec. 1772, Stats. (1898), as amended by ch. 507, Laws of 1905, provides that the corporate articles, or a duly verified copy, shall be filed with the secretary of state, and a like verified copy be recorded in the office of the register of deeds of the county in which the corporation is located, and that the corporation shall not have legal existence until the articles are so left with the register. It is not clear that such existence dates from the time of such leaving. The reasonable inference is to the contrary; that the statutory idea is not corporate existence from and after the time the articles are left with the register of deeds, but that it will not wait, necessarily, for the recording, but only upon issuance by the secretary of state of the "certificate of incorporation." The statute requires the register, not any one representing the proposed organization, upon receiving the certified copy for record to "forthwith transmit to the secretary of state a certificate" showing the fact of such leaving. "Upon receipt of such certificate" it is made the duty of such secretary to *"issue a certificate of incorporation."* The idea seems to be that upon such issuance corporate existence shall commence, notwithstanding the articles may not yet have been recorded. So the certificate, or it and the recorded and filed articles, may well have been, and in all probability were, averred to be the corporate charter, and, under the rule in the case cited in the opening part of this opinion, the averment of the issuance of the charter should be regarded as an averment, inferably, of all steps requisite to such issuance and to corporate existence.

In view of the foregoing, the mere fact that the pleader spoke of the corporation as "pretended" does not seem to be of much consequence. The complaint, as a whole, seems, quite clearly, to merely use the term "pretended" with reference to the ordinance of the city granting a franchise to the defendant

and its right under its "corporate charter" (not pretended corporate charter) to exercise the franchise. That is made quite plain by the fact that the prayer for relief goes to that franchise and the claim of right to exercise it; not to corporate existence.

In view of the foregoing it seems, corporate existence can easily be read out of the averments by the liberal rules we have referred to, and that the order appealed from should be reversed.

A motion for a rehearing was denied February 1, 1910.

CLARY, Administratrix, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

October 27, 1909—February 1, 1910.

Railroads: Negligence causing death of employee: Movement of trains, etc., in yard limits: Rules: Construction: Evidence: Ambiguity: Abrogation: Contributory negligence: Questions for jury.

1. In an action for death caused by negligence, where the burden of proving the contributory negligence of the decedent is upon the defendant, a finding in the special verdict negativing such contributory negligence should not be changed by the trial court unless the fact is established affirmatively by undisputed evidence.
2. A rule of a railway company that within yard limits "all trains will move under perfect control . . . so as to make an accident impossible," does not impose upon the company or its employees the absolute duty of making all accidents impossible, but means (in this case at least) that the rate of speed and consequent degree of control shall be such as to prevent an accident having for its cause an excessive speed and consequent lack of control.
3. A rule that "transfer men and yard crews working within yard limits must move at a rate to insure safety," must have a similar construction.

4. The construction of a rule which in clear terms applies to all trains entering and passing through certain yard limits cannot be affected by evidence showing that it was often or commonly disregarded.
5. A rule that yard crews working within yard limits during weather that obscures the view must move "under flag protection," is ambiguous; and it is competent to show the common interpretation placed thereon by persons acting or purporting to act thereunder, or to show that if the rule required certain things it had been abrogated by common and general disregard thereof.
6. A yardmaster in charge of railway yards represents the railway company for the purpose of enforcing rules applicable to such yards, acquiescing in the abrogation of such rules, or construing them, when ambiguous, by customary action thereunder.
7. A rule requiring yard crews in obscure weather to move under flag protection, and a rule requiring all trains entering the yards to move under perfect control so as to make an accident impossible, are complementary and should be construed together.
8. An injured person cannot be held to have been guilty of contributory negligence unless (1) he acted otherwise than an ordinarily prudent person would ordinarily act under the same or similar circumstances, and (2) his acts or omissions so varying from the standard of prudence contributed proximately to cause his injury.
9. Whether or not an engineer of a switch engine, who was killed in a collision between his engine and a freight train running through yard limits on a foggy day at a high rate of speed, was guilty of contributory negligence in moving through the yard, under direction of the yardmaster, without having a flagman ahead, was in this case a question of fact for the jury.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondent there was a brief by *Greene, Fairchild, North & Parker,* and oral argument by *H. O. Fairchild.*

The following opinion was filed December 7, 1909:

TIMLIN, J. After hearing the evidence in this case the jury returned a special verdict finding that the plaintiff's de-

cedent was on December 14, 1906, while in the employment of defendant as engine driver on a switch engine in the railroad yard at Marinette, killed by a collision between this switch engine and a freight train coming into said yard. The engine driver of the freight train was guilty of negligence which was the proximate cause of the death, and there was no want of ordinary care on the part of deceased which contributed proximately to cause his death. The damages to the plaintiff (his widow) were fixed at $5,000. The trial court, on motion, changed the answer of the jury to that question of the special verdict relating to the contributory negligence of the deceased so as to find the deceased guilty of contributory negligence, and then rendered judgment on the verdict so amended in favor of defendant. The only question presented upon this appeal is whether such action of the trial court was authorized upon the evidence presented. Or, in other words, whether it appeared affirmatively and from undisputed evidence that the deceased was guilty of a want of ordinary care which proximately caused or contributed to cause his death. The correct inquiry in such case, where the burden of proof is upon defendant, is not whether there is evidence to support the finding of the jury, because that may be supported by lack of evidence in whole or in part, but whether there is uncontroverted evidence which supports the ruling of the trial court in changing such an answer. Omitting the evidence bearing solely upon the negligence of the defendant, for its negligence is upon sufficient evidence established by the verdict, and consisted in running a regular freight train into Marinette and through the yard limits on a foggy day at a high rate of speed, notwithstanding the rule hereinafter quoted, we proceed to consider the evidence bearing directly or remotely upon the contributory negligence of the deceased. It seems best to consider this evidence under separate heads.

Yards.—Some confusion on this subject is caused by the rules and time cards, which speak of trains going from Mari-

nette towards Crivitz as trains going east, and those coming into Marinette from the direction of Crivitz as trains going west, when in fact, according to the true direction, the first-mentioned trains are going more nearly west and the last-mentioned trains more nearly east. The yard in which deceased operated his switch engine, under the orders of the yardmaster, Graham, was more than three miles long, and its termini were marked by boards or signs alongside the track bearing the words "Yard Limits." Identifying the west end of this yard, one of the rules said: "Menominee and Marinette yard limits extend to yard limit board east (west) of Park Mills siding switch east (west) of Marinette." The switch for Park Mills siding is about one and one-fourth miles from Marinette depot. Between the Marinette switch, a short distance west of Marinette depot, and Park Mills siding, there was but a single track more than a mile in length, which connected between the side tracks at Marinette and those at Park Mills and was included in the designated yard, and used for yard purposes and also by regular passenger and freight trains coming into Marinette from the west and leaving Marinette going west.

Rules.—It will not be necessary to consider all the rules offered in evidence and before the jury. Some of them are mere generalities, declaratory of the common-law duties of employees engaged in a hazardous service. Some relate to the duties of such employees to provide themselves with signals and familiarize themselves with the printed rules, and some have no special application to the question raised on this appeal. In that part of rule A56 relating to yard limits at Marinette occurs the following: "All trains will move under perfect control within these limits so as to make an accident impossible." It was sufficiently shown that the incoming train, which collided with the switch engine of the deceased, was a "train" within the meaning of this rule, and that it did not conform with this rule in the least, and it was also sufficiently shown that the switch engine of the deceased with its

two freight cars *en route* for Park Mills siding for the purpose of switching was not a "train" within this part of the rule. This sentence of the rule is not, however, to be taken literally, so as to cast the absolute duty of making all accidents impossible upon the defendant or its employees, but may be taken to mean, at least so far as the instant case is concerned, that the rate of speed and consequent degree of control shall be such as to prevent an injury having for its proximate cause that which is, under the circumstances in evidence, an excessive rate of speed and the consequent lack of control. So far as defendant's negligence is concerned, this is settled by the verdict. Rule A56 also contains the following:

"Transfer men and yard crews working within yard limits must move at a rate to insure safety, and during weather that obscures the view must move under flag protection."

This rule did not apply to the incoming train, but did apply to the deceased and those constituting the switching crew. The words "to insure safety" must have a similar construction to the words "to make an accident impossible," in the rule first quoted. Much evidence was received bearing upon the construction which should be given these rules and relating to the mode in which business was transacted under these rules by those who presumably knew the rules. With reference to the first-quoted rule, it was testified that this rule was often and perhaps commonly disregarded by freight and passenger trains coming into Marinette, and it was understood that such trains had a right of way as against switching engines. But while this might be evidence tending in some degree to show the abrogation of the rule by long-continued disregard or non-user with acquiescence of all immediately connected with its enforcement, the construction of that rule could not be affected by such evidence because of its clear terms including all trains entering and passing through the yard limits. Graham was a yardmaster representing the defendant in charge of the yards in question, and directed the operations of the deceased and

his associates, and had been so engaged for six and one-half years. For the purpose of enforcing rules, acquiescing in the abrogation of rules, or construing ambiguous rules by customary action thereunder, he must be held to have represented the defendant. He testified that never during the entire period of his service had he used a flag in going from Marinette siding to Park Mills siding, and being questioned whether he had ever before gone out under conditions existing at the time in question, he answered:

"Well, I can't answer that intelligently, because I might not have seen a day like that before; that is, the conditions would be different, it would be either foggier or not so foggy, and, when it was any foggier than it was that day I always ascertained where the train was. When we left that day, I could see quite a little distance. When I left that day I could see far enough so that trains approaching each other could stop."

As he now construed the rule in question, it was a violation of it to go out on the day in question without flag protection, but he did not so construe it at the time he went out with deceased. He had gone out in the same way as he did at the time in question during similar fogs, not so dense, however. The witness displayed quite an argumentative disposition and considerable intelligence and at the same time such unfamiliarity with any feasible mode of flagging ahead as might have been accounted for consistently with statements contained in some parts of his testimony to the effect that it had never been done, and that he had no experience in so doing. For example:

"*Q*. Suppose you were down at Marinette, and you intended to go out to Park Mills siding to do some work, and were in a fog at the starting point and sent a man out, now how far would you send him? *A*. Well, I would send him, if I was going to send a flag—I do not think I would send a man in the first place. *Q*. You wouldn't send a man in the first place? *A*. No. *Q*. Well, then, if you wouldn't do it, no

use asking you how far you would send him. *A*. Not a bit. *Q*. You would not send him out at all? *A*. If it was in a dense fog, I wouldn't send him at all. A fog that I could see I would go the way I did that day."

There is other testimony from this same witness from which a contrary inference may be derived; but on the question of the right of the court to substitute his finding for that of the jury this other evidence is quite immaterial. Doran, a locomotive engineer of thirteen years' experience at and near the yards in question, and Dwyer, a locomotive engineer of sixteen years' like experience, as witnesses for the plaintiff, gave evidence tending to show that "flag protection" in this rule did not govern the case in hand, or that, if it did, it was quite uniformly disregarded. This testimony was competent on two grounds: First, as showing what the ambiguous words "flag protection" meant by showing the common interpretation placed upon these words by persons acting or purporting to act under this rule; second, as showing or tending to show that the rule, if it did require a flagman to walk ahead of the switch engine from one side track to another through this large yard, had been with the knowledge of the yardmaster abrogated by common and general disregard thereof. The explanation of the term "moving under flag protection," attempted by counsel in the trial court and in this court, seems to us erroneous and inconsistent with the object of the rule and the idea conveyed by the word "protection." If a moving locomotive in obscure or foggy weather sends a flagman ahead, the locomotive then waiting, after the flagman disappears in the fog ahead, there is no way in which the locomotive he has left can be informed whether he has or has not, before he reached the switch, encountered another train on the track. In case this flagman is to go ahead only a fixed distance, and then wait for the engine he has left to come up and overtake him, whereupon the engine stops and he advances another fixed distance and again waits until the engine reaches him, there is no protection

at all against a train coming as this freight was, at or near the relay points. On the other hand, if the flagman precedes the engine, the latter following him at a distance but keeping in sight, and if we assume that a flagman in a fog is as visible as an oncoming train (which is quite a violent assumption), then the presence of the flagman will exactly double the distance in which the trains will know of one another's approach, but this distance will be variable, depending upon the density of the fog; that is, if the one train can see the flagman 300 feet ahead and the other train also sees him 300 feet ahead of it, there will be 600 feet between the engines at the moment when each may be signaled regarding the presence of the other. This does not seem very adequate for protection. But enough has been said to show that the rule relating to movements of switch engines in the yards in obscure weather is quite ambiguous, and it is doubtful whether the counsel or the court, after all the investigation of this trial, now understands its application to all phases of yard work, and it is very clear that the yardmaster of the defendant does not understand it. Whether we consider moving under flag protection to mean requiring the preceding flag bearer to go ahead and out of sight of the engine following the whole distance to be covered, or to mean to make this distance by relays whether going out of sight or not at each relay, or whether we consider it to mean to go ahead of the engine, the latter following at the same rate of movement and at such distance as to keep the flagman in view, it must be apparent that the rule requiring the other train moving in the opposite direction to move slowly and under complete control is the necessary complement of the rule relating to the movements of the switch engines. One is a senseless and ineffective ceremony without the observance of the other. They relate to reciprocal duties and obligations concerning the same transaction; and here the reasoning of the learned circuit judge seems to be at fault in attempting to consider these rules separately and independently. They can no more be sepa-

rated for the purpose of construction than can statutes *in pari materia* or mutually dependent covenants in a contract.

Fog.—There was evidence in the case from which a jury might infer that when the switch engine left the station at Marinette, the fog, then in view, was not so dense as to require an ordinarily prudent person to make any change in the former mode of transacting the business of switching. They might believe that, because Graham did not think the fog was of such density as to create the obscurity mentioned in the rule, the deceased might have been of like mind and have like understanding of this rule. This was at least an item of evidence bearing upon the inquiry of ordinary care. The fog was more dense farther on, and down towards the bridge was so dense that one could not see a train approaching further than 200 to 300 feet, and Mr. Graham, watching carefully, did not see the incoming freight train until it was about 200 feet from the switch engine. Graham's figures relating to increasing intensity of fog are that about half way out to Park Mills one could see an approaching train through the fog 800 feet; farther on and near the bridge, 400 to 500 feet; farther on, and from the bridge to the place of accident, 200 to 300 feet.

Negligence of deceased under the foregoing conditions as to yards, rules, and fog.—The regular freight train No. 465, coming in from the west, was due at Marinette at 12:50 p. m. The evidence fails to show with any certainty whether one coming up to the station at Marinette several minutes later could notice whether this train had arrived or not. Graham was charged with the duty of ascertaining this fact, and he knew that freight No. 465 was overdue and had not arrived, when, with the deceased and other members of the switching crew, he came, on the switch engine with two cars attached, bound for Park Mills siding, at 12:57 p. m. to the Marinette depot. The switch engine carrying Graham, the deceased, and the switchmen slowed up as usual in passing the Mari-

nette depot. Graham glanced in and saw that the telegraph operator was not there, and, thinking the latter at dinner, made no inquiry with reference to the whereabouts of freight No. 465, but moved on out in the direction of Park Mills, from which direction freight No. 465 was then seven minutes overdue. Whether deceased at this time knew that freight No. 465 had not arrived is not satisfactorily shown. His knowledge of that fact is only to be inferred from two bits of evidence: First, that he had a time-table and knew when these regular trains were due at Marinette; second, that on the way out a conversation occurred between Graham and deceased at a point about one third of a mile from where the accident happened and where the fog was so dense that they could see only about 500 feet ahead. This conversation is not always given by Graham consistently, but, selecting a phase which the jury might have believed, it appears that Graham said to the deceased: "We are going a little too fast. We had better slow down." The deceased applied the air brake, slowing down from fifteen miles to about six miles an hour. Graham remarked, "We must run slower and look out for No. 465," and the deceased answered, "They ought to have sense enough to come in slow a day like this." Proceeding from this point slowly, Graham soon heard freight No. 465 whistle some distance ahead of the switch engine, and at once notified deceased, who proceeded to stop his engine, reverse its movement, and run backward with all possible dispatch. Graham, intently watching for the oncoming freight, saw it appear out of the fog, far within the yard limits, and coming at the rate of twenty-five to thirty miles an hour, and about 200 feet ahead of the switch engine. Graham jumped from the switch engine while deceased was in the act of stopping and reversing. The engineer and fireman of freight No. 465 jumped from their engine. The deceased continued in his engine, and had succeeded not only in bringing it to a stop, but also getting it in motion backing away from the oncoming freight, and had made some 120 feet backward when the collision took

place which produced death. Upon this showing can we say that the uncontroverted evidence shows the deceased guilty of a want of ordinary care which contributed to cause his death? The question of contributory negligence covers two propositions: First. Did the person whose conduct is under investigation act otherwise than an ordinarily prudent person would ordinarily act under the same or similar circumstances? Second. If this point is resolved in the affirmative, did his acts or omissions so varying from this standard of prudence contribute proximately to cause his injury? With reference to the first, there was evidence from which the jury might infer that the deceased was as careful at least as Graham, and that both were as careful as was usual and customary in the conduct of like operations in this particular yard. So far as the interpretation of the rule relating to switch engines was concerned, the practice for years, and the evident understanding of this rule by his superior, Graham, is entitled to some probative weight. Who will say that an ordinarily prudent person would refuse to acquiesce in this interpretation of the rule in question and refuse to proceed, or, having proceeded to within one third of a mile from the point of collision, would take the command out of Graham's hands when the fog was growing thicker and himself send a flagman ahead? After the whistle of No. 465 was heard, everything was done which could be done. Graham then after jumping ordered a flagman ahead, but it was too late. If deceased showed any lack of ordinary care it must have been in starting out from the depot at Marinette or in failing to stop the engine and send a flagman ahead at the point at which it became manifest that the fog was of sufficient density to require this precaution. With reference to the first point, there is evidence of Graham tending to show that the fog there visible was not of such density as to require unusual or extraordinary care. With reference to the second point, there is evidence tending to show that the deceased might have relied on the superior knowledge or higher authority of Graham. But the second

branch of the inquiry is beset with still greater difficulties in the way of supporting the ruling of the court below. Would a flagman ahead have been in the least effective to prevent a collision of the switch engine with train No. 465, the latter moving at thirty miles an hour and the fog so dense that the freight train remained invisible until within 200 feet of the switch engine? Assuming that rule A56 relating to switching engines was never abrogated by acquiescence and disregard of it, and that it required each and every member of the switching crew to conform to it, notwithstanding their superior understood the rule differently, is it not a question of fact whether the sending of a flagman ahead in the only feasible way would have prevented the injury; and consequently whether the omission so to do was at all a proximate cause of the injury? The rule requiring the sending of a flagman ahead of the switch engine, if it is to be so interpreted as to apply in the instant case, is for protection against and for another engine approaching from the front under such control as the reciprocal rule governing the movements of the other train requires. In a dense fog a flagman 200 feet ahead of the switch engine would be entirely ineffective to protect against an incoming train moving at thirty miles per hour. To send him farther ahead would be to require both the engines to come to a stop for an indefinite time on the main line at the risk of the other trains. Giving this rule the former interpretation, it was a question for the jury whether the failure to send a flagman 200 feet ahead was a proximate cause of the plaintiff's death. We are of opinion that the circuit court erred in deciding that the plaintiff was guilty of contributory negligence, and consider that question one of fact for the jury. Hence the answer of the jury must be reinstated and judgment given for the plaintiff on the verdict.

By the Court.—It is so ordered.

A motion for a rehearing was denied February 1, 1910.

ZERATSKY, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

October 28, 1909—February 1, 1910.

Railroads: Injuries to employees: Statute construed: Proximate cause: Contributory negligence: Comparative negligence: Questions for jury: Degrees of negligence: Appeal: Review of evidence: Rules of railway company: Construction: Burden of proof.

1. In subd. 3, sec. 1816, Stats. (Laws of 1907, ch. 254), in the phrase "negligence *directly* contributing to the injury," the word "directly" is used in the sense of *proximately*, and its use does not operate to change the law on the subject of proximate cause.
2. Under sec. 1816, Stats. (Laws of 1907, ch. 254), in an action against a railway company for injuries sustained by an employee, it is for the court to determine whether the evidence tends to show negligence attributable to the company and whether it tends to show contributory negligence of the injured person. If the evidence does so tend, it is for the jury to determine therefrom whether or not there was in fact such negligence or contributory negligence. If it is found that the negligence of both parties concurred to produce the injury, the jury is then to determine whether the negligence of the injured person was slighter or greater as a contributing cause to the injury than that attributable to the company, unless the evidence permits of but one inference, in which case the question is to be decided by the court as a matter of law.
3. It is not impracticable to have the jury determine whether the negligence of the injured person was slighter or greater as a contributing cause to the injury than the negligence of the company; and the determination of that question need not be based upon the classification of the degrees of negligence into slight, ordinary, and gross.
4. In reviewing a decision of the trial court to the effect that, as matter of law, plaintiff's negligence was at least equal to that of defendant as a contributing cause to the injury, the permissible inferences from the evidence which are most favorable to plaintiff must be assumed to be the inferences which the jury would have drawn.
5. Under a rule of a railway company that when a train stops between stations a flagman must immediately go back with proper signals to stop any train that may be following, and another rule that train and engine men will be held equally responsible

for a violation of any of the rules governing the safety of trains and must take every precaution for the protection of trains even if not provided for by the rules, it was the duty of the rear brakeman of a freight train which stopped between stations to go back with the required signals, though not directed to do so by the conductor or by signal from the engineer as provided in another rule.

6. Under the evidence in this case it was a question for the jury whether the negligence of the rear brakeman on a freight train which had stopped between stations, in failing to go back with signals to stop any train which might be following, was slighter or greater, as a contributing cause to his injury in a collision between a train so following and his train, than the negligence of other employees, attributable to the company.

7. In passing upon such question all the acts of other employees occupying positions of responsibility with respect to the movement of the trains (including in this case the train dispatcher, the engineer of the following train, and the conductor and engineer of the freight train) must be viewed in comparison with the acts of plaintiff, in the light of their respective duties and responsibility.

8. Sec. 1816, Stats. (Laws of 1907, ch. 254), does not change the rule that in an action by a servant for personal injuries the burden of showing contributory negligence is upon the defendant.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

Plaintiff was the rear brakeman on the defendant's extra freight train, consisting of fifty-four cars, a caboose, and an engine, which left Green Bay, Wisconsin, September 28, 1907, at 10:10 p. m., bound for Milwaukee. It had a full crew of trainmen, consisting of the engineer, fireman, conductor, and two brakemen. The train proceeded south through De Pere at 11:05 p. m., and through Askeaton, and when about one and one-fourth miles from Hilbert Junction the engine ran out of water and was unable to pull the train to Hilbert Junction. The plaintiff was in the caboose when the train stopped. The engineer, fireman, conductor, and other brakeman, without informing plaintiff of their intention, cut the engine from the train and proceeded with it to Hilbert Junction to get a

supply of water without giving a signal to the plaintiff, as required by the following rule of the company:

"Rule 26. The one long, two short, and one long blast of the whistle thus, ———, — —, ———, will be given by engineers when they find it necessary to stop between stations and to notify conductor, thus enabling him to drop off and send back a flagman."

As soon as plaintiff observed that the train had stopped he left the caboose and went forward to about the middle of the train to ascertain the cause of the stopping. He there observed that the engine had been cut off and had left with the rest of the crew, and he then started back. The plaintiff stated that while going forward and coming back he observed the odor of a hot box, and he tapped the boxes to find the one, and immediately upon his return he went into the caboose to get his dope bucket to fix it. He testified that he took no more time than was necessary to make this trip. "Special rules for train and engine men" of the defendant contains the following:

"Rule B4. Conductors and brakemen must examine their trains, whenever there is an opportunity to do so, looking particularly for hot boxes and defective draft and brake rigging."

Meanwhile the defendant's regular passenger train bound for Milwaukee on the same line as that on which the freight was proceeding had arrived at Green Bay at about 12:30 a. m. and had left a few minutes later. At De Pere it was permitted to enter the block which was occupied by the freight train. One of the rules of the defendant was as follows: "Rule 3. Trains must not pass a block signal at danger except under authority of a clearance card form 168." The conductor and engineer were given permissive and clearance cards under the following rules, which trainmen are supposed to know and obey:

"Rule 4. When the block signal stands at danger, the operator issues a clearance card which states that he has no orders or no further orders for the train named. The train receiving

clearance card may proceed if its time-table rates or special orders permit it to do so.

"Rule 5. The permissive card is used when trains are permitted to pass a block signal at danger and enter the section under notice that the preceding train has not cleared the same section. This is to be used only by direction of the train dispatcher.

"Rule 6. When a train is to proceed under a permissive card, the conductor and engineer must each have a card of the following form properly filled out and signed by the train dispatcher."

"Rule 10. Trains running under the authority of a permissive card or caution signal must run with great care and at reduced speed to insure against collisions with trains ahead."

A special caution order was issued to the conductor and engineer in these words:

"Extra east, Dietzler conductor, left De Pere at 11:42 p. m. and has not yet arrived at Hilbert Junction. Proceed cautiously, expecting to find them on main line at any point without flag protection."

The passenger proceeded south—or east as it is called in railroad parlance—and, when running at a speed of about thirty miles per hour, collided with the rear end of the freight train which had stopped on the main track a mile and one-quarter from Hilbert Junction. The freight train crew had not been specifically informed that the passenger train had been permitted to enter the same block or section of track as was occupied by the freight train. The plaintiff, who was in the caboose of the freight train, was seriously injured by the collision. The fireman of the passenger train was killed and the engineer was injured. There was a straight and unobstructed stretch of track back of the caboose of 3,000 feet. Whether or not the red lights were burning on the caboose was a disputed question on the trial.

The following rules of the defendant regarding the operation of trains were in force at the time of the collision:

"Rule 62. When a train stops between stations, a flagman must immediately go back with proper signals to stop any

trains that may be following. Not a moment must be lost in inquiry as to the cause of stoppage or its probable duration. The flagman must go back instantly and shall take not less than three torpedoes, also a red flag by day and a red and white light by night, and shall place one torpedo on the rail on the engineer's side when three-fourths of a mile (twenty-three telegraph poles) distant from the rear of train, and at a further distance of one-fourth of a mile (eight telegraph poles), he shall place two torpedoes on the rail on the engineer's side. He will then, selecting a place where the view is long and clear, remain until the train is stopped or he is recalled. Returning he will leave two torpedoes at the most distant point from his train and take up the rest. Whenever it becomes necessary, the forward end of the train shall be protected in the same manner."

"Rule 50. Train and engine men will be held equally responsible for violation of any of the rules governing the safety of trains, and they must take every precaution for the protection of trains, even if not provided for by the rules."

"Rule 26. Conductors will be held responsible for the faithful performance of the duty required on the part of their brakemen."

"Rule A58. Trains moving under permissive card will be held responsible for an accident in the nature of colliding with the train occupying the section which required movement under the permissive card. Engineers will not be censured for moving at a speed to insure against accident."

The defendant alleges that the collision was caused by the failure of the passenger engineer to observe its train orders and the rules and regulations known to him, together with the contributory negligence of the plaintiff and his violation of the defendant's rules and regulations.

At the close of the testimony the court, on defendant's motion, directed a verdict for the defendant, and judgment was entered upon the verdict so directed. This is an appeal from the judgment.

For the appellant there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondent there was a brief by *Greene, Fairchild, North & Parker,* and oral argument by *H. O. Fairchild.*

The following opinion was filed December 7, 1909:

SIEBECKER, J. The right of the plaintiff to recover in this action is governed by the provisions of sec. 1816, Stats. (ch. 254, Laws of 1907), which provides that:

"Every railroad company shall be liable for damages for all injuries . . . sustained by any of its employees, . . . when such injury . . . shall have been sustained by any . . . employee of such company, while engaged in the line of his duty as such and which such injury shall have been caused in whole or in greater part by the . . . negligence of any other officer, agent, servant or employee of such company, . . . in the discharge of, or . . . by reason of failure to discharge his duties as such."

It is also provided that the court shall submit to the jury the questions whether any negligence attributable to the company "directly contributed to the injury," and, if such negligence is found, "whether the person injured was guilty of any negligence which directly contributed to the injury," and, if the jury shall find the injured person guilty of contributory negligence, the court shall then submit to them the inquiry "whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company." It is further provided:

"In all cases where the jury shall find that the negligence of the company . . . was greater than the negligence of the employee so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover. . . ."

The trial court directed a verdict for the defendant upon the ground that the evidence in this case showed as matter of law that the company's negligence, which concurred with that of the plaintiff to produce his injuries, was not greater and contributed in no greater degree to such injuries than the plaintiff's contributory negligence.

In *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W.

309, 120 N. W. 756, we had occasion to declare that these provisions of the law did not affect the judicial power of the court to determine whether the evidence presented tended to show negligence attributable to the company and contributory negligence of the person injured, and, if the evidence tended to show such negligence, it was for the jury to determine therefrom whether or not in fact such negligence or contributory negligence existed. It was also decided that the provisions declaring that the contributory negligence of the person should be no bar to his recovery in cases wherein the jury should find that the negligence attributable to the company "was greater than the negligence of the employee so injured, and contributing in a greater degree to such injury," were within the legislative power of police regulation.

Upon this and other appeals, in actions under this statute, additional considerations have arisen respecting the interpretation of the context of the act and its effect in the modification of the law as it theretofore existed. Subd. 3 of the act requires that there shall be submitted to the jury the question whether the company's negligence and the injured person's contributory negligence *directly* contributed to the injury. The inquiry is suggested: Does the use of the word "directly" operate to modify the law of proximate cause in the law of negligence? We discover nothing in the phraseology of the act indicative of a legislative intent to modify the law on this subject. Nor does the language employed necessarily operate to effect a change as to what shall constitute proximate cause. The provisions are that the jury shall determine whether the company and the injured person are guilty of negligence "directly contributing to the injury." The word "directly" was evidently employed here in the sense of proximately, and was intended to include and comprehend the negligence which naturally and probably caused the injury; that is, the negligence which proximately contributed to produce the injury. True, it has been said, in cases reviewing

instructions to juries in negligence cases where the jury were informed that the proximate cause of an injury was such negligence as directly caused it, that such instructions were incorrect and failed to properly inform the jury that the right to recover rested on the fact that the damages claimed were the natural and probable result of the negligence charged. The criticism in these cases of the use of the word, as there applied, was that it did not convey to the jury the idea that the alleged injury must be shown to have naturally resulted from the negligence charged and that it was within reasonable anticipation that such negligence might cause an injury. As used in this statute it is applied to negligence in the accepted legal sense of responsible and efficient causation. This seems to us the reasonable and natural inference from the phraseology of the statute. We think it was so intended by the legislature, and that the words of the statute, "negligence directly contributing to the injury," were employed as expressive of the idea of negligence proximately contributing to the injury, and in the trial of cases wherein it is appropriate to inform juries of the provisions of the law it is to be interpreted that the clauses referring to "negligence directly contributing to the injury" are applied to the negligence proximately contributing to the injury.

The statute also provides that if the jury shall find that the negligence attributable to the company "was greater than the negligence of the employee so injured, and contributing in a greater degree to such injury," then plaintiff's contributory negligence shall be no bar to his recovery. This abrogates the pre-existing law that the contributory negligence of the injured person may defeat recovery. This provision is a complement to the preceding subd. 2, which makes railroad companies liable for injuries to employees which have resulted "in whole or in greater part" from the negligence attributable to them. It is to be noted that the questions prescribed by subd. 3 are made to harmonize with subd. 2, in that the negligence

of the company and the contributory negligence of the person injured are treated, in effect, as contributing causes to the injury. While the same phraseology is not employed in subd. 4 in dealing with this subject, it is evident that the legislature intended this provision to carry into effect the liability created by subd. 2 and to so modify the contributory rule as to accord therewith and to enforce recovery in those cases wherein the negligence of the injured person should be found to be slighter as a contributing cause to the injury than that of the company.

Interpreting these provisions together, we are persuaded that the legislative intent was to apply this legislation to the law as established by the decisions of this court. It had been recognized by this court that the negligent acts of two or more responsible agencies might proximately contribute to produce an injury and that their negligences might concur in different degrees in proximately causing it. In *Cunningham v. Lyness*, 22 Wis. 245, the court, referring to the concurrence of an injured person's negligence with that of another as a bar to recovery, states: "A party cannot recover for an injury of which his own negligence was in whole or in part the proximate cause." In an exhaustive review of the decisions of this court on the subject of negligence and contributory negligence in *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446, the subject was adverted to. The result is embodied in the headnote and is stated thus:

"In an action to recover damages claimed to have been caused by actionable negligence of the defendant, contributory negligence of the plaintiff, however slight, precludes his recovering damages, notwithstanding negligence of the defendant, however great, contributed thereto."

This idea that the concurrence of the negligences of both parties to a legal controversy might constitute the proximate cause is also recognized and exemplified in numerous crossing cases that have come before this court.

The context of the statute indicates that the legislature as-

sumed this to be within the legal conception of proximate cause in the law of negligence, and proceeding thereon framed this statute to modify the right of recovery in negligence cases against railroad companies by providing that if the company's negligence contributed to cause the injury in greater degree than that of the injured person, then the company should be liable for the resultant damages as if its negligence had been the sole cause of the injury; or, in the language of subd. 4, if "the negligence of the company . . . was greater than the negligence of the employee so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover." In administering the statute in cases as they actually arise, it devolves on the court to determine whether there is any evidence tending to show negligence attributable to the company and contributory negligence of the injured person which proximately contributed to the injury complained of. If the evidence produced shows that the negligences of both parties to the action concurred to produce the injury, unless the evidence is so clear and undisputed as to permit of only one inference on the question, it then becomes a question for the jury to determine whether the negligence of the injured party was slighter or greater as a contributing cause to the injury than that attributable to the company. In case the evidence permits of only the one inference it devolves on the court to decide the issue as a matter of law. Whether a case is one for a court or jury to determine cannot be settled by any general rule or classification of cases, but must be determined in the light of the facts and circumstances of each particular case. The question is not ascertainable by any rule of absolute measurement, and it therefore must be submitted to human judgment.

It has been claimed and the suggestion is made in argument on this feature of the law that it is practically impossible for a jury to determine such controversies upon a scale of infinite degrees, and that the legislature therefore must have intended

that the law should be applied in view of the generally accepted classification of the degrees of negligence into slight, ordinary, and gross, and that such degrees of negligence should be observed in comparing as contributing causes the negligence of the company and that of the injured person. We discover no such intent or provision in the law, nor do we deem it impracticable to have the jury judge whether the negligence of the injured person contributing to cause the injury is slighter or greater than that attributable to the company. Applying the statute to the case before us, we cannot accede to the defendant's claim that it would be mere speculation and guesswork for the jury to attempt to determine whether plaintiff's contributory negligence was slighter or greater as a contributing cause than that of the defendant.

It is alleged that the plaintiff was guilty of negligence in omitting to perform his duty as brakeman on the occasion in question, in that he failed to protect the rear of the freight train from the passenger train, and that this failure of duty by him was a proximate cause of the collision and his injuries. The contention is that but for plaintiff's contributory negligence the injury would not have been received, and hence that the negligence of the plaintiff in its most favorable aspect under the law is equal to the negligence attributable to the defendant as a contributing cause to the injury. In the solution of this question all of the inferences from the evidential facts most favorable in support of the plaintiff's alleged cause of action must be assumed to be the view of the case which may be taken by the jury. The contention that plaintiff's duty did not require him to flag the train under rule 62 unless directed so to do by the train conductor or by a signal from the engineer by a blast from the whistle cannot be sustained. The rule is clear in its provision that when a train stops between stations a flagman must go back to stop any train that may be following, give the prescribed signals to it, and remain at the place to which he has gone until the train stops or he is re-

called. This duty is further enjoined by rule 50, which informs persons engaged in the train service that:

"Train and engine men will be held equally responsible for a violation of any of the rules governing the safety of trains, and they must take every precaution for the protection of trains even if not provided for by the rules."

We find no support for plaintiff's claim that the duty imposed by these regulations was disregarded in practice to such an extent as to abrogate them. Nor is it shown that the plaintiff was informed while in defendant's service that these rules and the duties imposed thereby were not obligatory on him. We think that the plaintiff as rear brakeman of this train was required to perform whatever duty these rules imposed on him.

The evidence tends to show that the plaintiff was the rear brakeman on a freight train which came to a stop on the main track between stations. He had not been informed by the engineer's signal that the train was to make a stop. So far as he then knew, the train might be stopped only momentarily. In the operation of trains stops of a momentary character must inevitably occur, and on such occasions it would be both unnecessary and impracticable for the rear brakeman to leave the train at once to signal a train that might be following. It is obvious that if the brakeman should immediately so leave his train on all such occasions, he would on many occasions be wholly separated from his train. He testifies that he went forward to a point where he observed that the engine had been detached from the train and had departed for Hilbert Junction; that then he crossed over to the other side of the train; that he observed the odor of a hot box, and that he attempted to locate it while he was returning to the caboose; that he took no more time than it naturally takes to make such a trip; that he returned to the caboose without intending to go and signal the coming passenger train; that he at once looked for the dope bucket in the caboose to fix the hot box; and that the col-

lision occurred immediately. It is argued that this amounts to a violation of his duty under the rules and establishes his contributory negligence. Upon learning that the engine had departed for Hilbert Junction it became the duty of the plaintiff to procure the means and to go back to signal a coming train, and in omitting so to do he was guilty of not exercising that care which the situation and the exigencies of the case demanded, but it is not so clear that it can be held as matter of law in what degree it contributed to produce the injury. The contention that it amounted to the very highest degree of negligence because the accident would not have happened but for the violation of defendant's rules seems necessarily to assume that the plaintiff, in making this trip to ascertain whether the train was to stop more than momentarily, and in not instantly, upon the stopping of the freight train, taking steps to signal the coming passenger train, was guilty of such a high degree of negligence as to preclude his recovery. He testifies that he consumed from fifteen to twenty-five minutes on his trip; that he relied on the red-light signals displayed on the rear of the caboose to signal the coming passenger train; that he went to the caboose for the dope bucket to fix the hot box, and while in this act the collision occurred. It is not clear from the record that if on his return to the caboose he had immediately proceeded to procure his lantern and torpedoes to signal the coming train he would have prevented the collision. The degree of negligence involved in these acts is not so clear that it can be determined as a matter of law. Under the circumstances it is a mixed question of law and fact which must be resolved by the jury.

The case also demands of the jury that they determine in what degree the negligence attributable to the company contributed to produce the injury. Among the matters bearing on this question it is alleged that the train dispatcher was derelict in his duty in permitting the passenger train to enter

the block as he did; that the engineer of the passenger train omitted to obey special and express orders in running his train on the block; and that the conductor and the engineer of the freight train were negligent in not signaling or warning this brakeman of the stop, and in failing to ascertain before stopping that the plaintiff as rear brakeman was on duty or capable of protecting the rear of the train. In passing on the question of whether or not the company's negligence caused plaintiff's injuries in greater degree than that of the plaintiff, all of these facts relating to the omission of duty on the part of these servants who occupied positions of great responsibility in the conduct of the defendant's business must be viewed in comparison with the acts of the plaintiff in the light of their respective duties and their responsibility to exercise a degree of care commensurate to the exigencies of the situation. The case is not so plain and clear that but one inference can reasonably be drawn from the evidence as to these questions, and they therefore should have been submitted to the jury for determination.

The plaintiff's contention that the defendant is estopped from charging plaintiff with contributory negligence because he was sent out on this trip in such a state of physical and mental exhaustion from being in constant service for the defendant immediately preceding it as to make him incapable of comprehending and performing the duties required of him is not sustained. The evidence is undisputed to the effect, and plaintiff claims, that he attended to and comprehended all his duties. His whole claim and the showing refute the inference that he was unable to attend to his duties.

It is averred by the defendant that since the plaintiff has the burden of proving that the negligence attributable to the defendant was a greater contributing cause to the injury than that of the plaintiff, this involves a modification of the rule which has heretofore obtained in this state which casts the burden of proving plaintiff's contributory negligence on the

defendant. This rule operated to relieve the plaintiff from the necessity of showing himself free from contributory negligence. We discover nothing in the law evincing an intention of the legislature to change the rule, nor do we find that such a change is necessary for the orderly administration of the various provisions of the law.

From the views indicated, it results that the court erred in directing a verdict. The case should have been submitted to the jury for determination of the issues under the law as amended by ch. 254, Laws of 1907.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

The following opinion was filed December 21, 1909:

MARSHALL, J. (*dissenting*). Truly, as an eminent writer said many years ago, "To dare; that is the price of progress." "It is necessary, for the sake of the upward march of the human race, that there should be proud lessons of courage permanently on the heights." Looking at the revolutionary character of ch. 254, Laws of 1907 (sec. 1816, Stats.), from that standpoint alone; considering it as a striking public conception of the needs of new conditions and expression thereof, independently of fundamental principles, it responds in full measure to the sentiment of the literary philosopher. To that extent it is admirable; but viewing it, as we must, from the standpoint of our constitutional system, and legal principles settled by the courts, not within the province of legislative authority to disturb, one can but be impressed with the idea that the limits upon legislative power were not carefully studied, neither was the meaning of significant terms in the law, as defined and settled in the common law and judicially recognized for ages, clearly comprehended.

It may be that the times called for such a radical change of human responsibility as was attempted to be wrought by the

act. It may be that they called for still greater changes. I would not take issue thereon. That impatience with existing law and its administration was the mainspring of the legislation, and that such impatience dimmed the perceptives somewhat as to fundamental principles, I cannot doubt.

I must look upon the legislature as a body of wise, intelligent men, who, either as a whole, or by the particular ones who were permitted to cast the legislation, knew what they desired to do and used language to that end. "If the end be legitimate" and the manner of reaching it be "appropriate to that end," in any reasonable view, of course I would sustain the law without reluctance, regardless of my personal idea of the policy thereof. I would not interpolate words, not in place by necessary implication, nor substitute one word for another in order to read out of the law a meaning which is not there in its literal sense, and which, looking at the conditions which moved the enactment of it, it seems that neither the legislature, as a whole, nor those particular members, or assistants who were permitted to frame the law, intended. I would take the law as I find it, and sustain it if it be legitimate, and judicially nullify it if it be not.

I am not unmindful that courts go a great way, and properly so, to save a law from absurd consequences, and particularly from condemning it as unconstitutional, striving to read therefrom a meaning which is legitimate and can fairly be said to be within the reasonable scope of its language, resolving all reasonable doubts to that end; but to nullify the will of the legislature by attributing to its language a meaning not intended, though the effect thereof might be to save the law from condemnation as void for uncertainty or unconstitutionality, is as wide a departure from the judicial function as to condemn it when not clearly outside constitutional limitations. It were better for the public interests, and would give greater dignity to the lawmaking power, to take the legislative ideas as found expressed, if they can be discovered

reasonably, and give effect to them or not according as they are within or without proper boundaries of legislative effort.

In scanning an act of the sort of the one before us we can no more shut our eyes to the present method of producing laws, than we can to the conditions which lead to them, in determining their character and constitutionality. The former sheds much light on the legislative purpose, and the latter as much effect upon the weight to be given to the fact of legislative approval. Not on the mere policy of the legislation, for that is not a field for judicial exploration, but on the question of whether the enactment is within or without the fundamental limitations of legislative authority.

While the principle is as vital now and of as much dignity as ever, that the judiciary must pay such high regard to the lawmaking power as not to place the stamp of judicial condemnation upon its work, unless it transcends, beyond reasonable doubt, constitutional limitations, in determining whether it does or does not, some, if not all, who are called upon to weigh the matter, will give a measure of consideration to the great change which has come about in recent years in the manner of making laws. That enactments, under present conditions, have some less weight of *prima facie* support from the mere incident of legislative approval, with some judicial students and administrators, than formerly, is most natural.

The act in question has been one of the most troublesome pieces of legislation with which the court has ever had to deal. I think all agree that it was framed by a layman or laymen, or by some person, or persons, without proper conception of legal terms and the scope of legislative authority, or the thought was to cut loose from judicial learning and to use words as they are ordinarily understood by people generally in common every-day life. That is strikingly apparent, as is indicated in *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 316, in the obvious, as I think, attempt to take from the court its constitutional authority to deter-

mine when, on the evidence, there is a controverted question of fact for submission to the jury, and to take from it the judicial function of determining what elements, particularly those of proximate cause, in the legal sense, make up a case of responsible fault.

The court is commanded by the legislation to submit specific questions to the jury, evidently, I think, as the ones involving responsible fault. It is declared that, "In all cases under this act the question of negligence and contributory negligence shall be for the jury" (sec. 1816, subd. 5); taken literally, a clear invasion of the judicial function. In the *Kiley Case,* as now, I was constrained to give the legislature credit for intending just what it said, and to hold that, since it exceeded its power in so invading the judicial field, and would doubtless not have passed the act at all, independently of such invasion, the whole act was unconstitutional. What the law is, what it has been, the meaning of legal terms, what constitutes a question of law and what constitutes a question of fact for a jury, and whether there is the latter or not, and when a controversy should be submitted to a jury as involving disputed matters of fact and when it should not; are all judicial questions with which the legislature has nothing to do under the constitution. Those principles are elementary. A failure to firmly maintain them would be treason to the paramount written law. That the lawmaking power would considerately desire not to have them maintained, or that it would fail to award proper merit for their strict maintenance, I would not think for a moment. However, the fact, as seems to the writer, that those principles were overlooked, as said in my independent opinion in the *Kiley Case,* brings into action as applicable, to some extent, to the legislation, the rule that when a court reaches a conclusion as to a matter of fact under a misconception of the law, or by overlooking it altogether, the ordinary presumption as to its correctness does not obtain.

There was no division in the *Kiley Case,* as I understand it, as to the validity of the law, taking it as it reads, and there probably would not be now. It was saved then, as in the case at hand it is to some extent now, by reading out of it, by rules of construction, a meaning which I cannot discover, applying such rules as I understand them, particularly the paramount one, that until there is uncertainty of sense there is no room for construction.

In now dealing with the act in a different situation than in the *Kiley Case,* it is more evident than ever that either the commonest principles of the law of negligence, intrenched in our jurisprudence, were overlooked, or there was a purpose to entirely change them. In reaching this conclusion I proceed thereto, all the time trying to get the legislative meaning out of the law, rather than to put such meaning into it, or a meaning which will sustain it.

Now, in one aspect of the case, whether the trial court was right in holding that, on the evidence, there was no jury question as to whether the act of the appellant contributed, directly, less than that of the engineer of the passenger train, to produce the accident, depends on the meaning of the law. In my opinion, certainly, if the language of the legislative questions is to be taken literally, there was no jury question, as the learned circuit judge held. But it is said that it is not to be so taken.

Possibly the purpose of the legislature was to adopt, somewhat, the principles of comparative negligence. On such principles, there was room in the evidence, perhaps, to say that one of the negligent individuals was in greater fault than the other. But how can we say such was the purpose? Comparative negligence, generally speaking, contemplates degrees of fault and responsibility on the party guilty of the highest degree thereof. There is no such idea of comparative negligence in the act in question.

In the published law, in large black letters, at the begin-

ning of sec. 1816, subd. 4, we read the words "Comparative negligence," but those words were not in the act as passed. They have been added by the person who happened to be employed to prepare the law for publication. Whether he was layman or lawyer we do not know. Though the editor chose to characterize the section as dealing with comparative negligence, when we read subd. 2 and subd. 3, which precedes it, we see comparative fault is not dealt with at all, nor proximate cause, as the same is understood in the law of negligence. Only comparative direct effects seem to have been in the legislative mind. Responsibility is not made to depend on fault in its proximate relation to consequences. Under the law, as it reads, there may be want of ordinary care, to any degree, yet, unless it directly produces the result complained of, there is no liability. Thus leaving out of view the numerous situations where there may be responsible fault by the rules of the common law, though not producing, directly, the injury at all; and making direct agency in producing the result the test of responsibility, in cases where the elements of proximate cause, which by the ordinary law, and the law of reason, are essential to responsibility, do not exist at all.

Subd. 3 requires the court to ask the jury whether the defendant was guilty of negligence directly contributing to the injury. What does that mean? Literally, as indicated, it means, was the defendant guilty of any negligence which contributed, in a physical sense, to produce the injury. Want of ordinary care is not, necessarily, within the meaning at all, nor the essential elements of proximate cause. All that is required to call for an affirmative answer to the question, is some negligence, however slight, and some consequent direct effect in producing the injury. These observations apply likewise to the legislative question required to be submitted as to the plaintiff's fault.

That the legislature intended to provide, as above suggested, hardly seems probable, but nothing else, in my judgment, can be read out of the act.

It seems that, because of impatience with the doctrine of proximate cause, which has been such an important element in the law of negligence in England and this country for generations, and impatience with the common distinction between mere negligence and want of ordinary care, it was thought to rid the law of those matters, so abstruse to laymen, but so very plain to the trained lawyer, and make any degree of negligence of a person, whether of the dignity of the want of ordinary care or not, and any degree of direct physical causation, whether characterized by the element of natural and probable result, or that of reasonable anticipation of injuring another or not, sufficient for responsibility, even though the degree of real fault on the part of such other be much greater than that of such person, if it does not in greater degree, immediately cause the result.

The third question to be submitted under the act, clearly, it seems, must be read in connection with the other two; was the "negligence of the" plaintiff "slighter . . . *as a contributing cause* to the injury than that of the" defendant? It should be noted that the question is not, was the negligence of the plaintiff slighter and did it contribute in greater degree, etc.; but was it slighter . . . *as a contributing cause*, etc. Consistently with the first two questions, by necessary implication, "direct" should be read before "contributing." In other words, the inquiry required is, was the negligence of the plaintiff less than that of the defendant as a direct contributing cause of the injury? That plainly makes the comparison not between degrees of fault, but between degrees of direct physical production of the result. True, we must confess at every step, it is almost incomprehensible that the legislature could have intended any such result, but the law seems to read so very plain that I can see no way to deal with it other than by giving effect to it in its letter, so far as constitutional, or condemn it as void for uncertainty.

I do not overlook that subd. 4 provides that the plaintiff shall recover if defendant's negligence was greater and con-

tributed in a greater degree, etc., thus speaking of comparative degrees of fault as well as of direct interference to produce the result; but the questions required to be submitted are inconsistent therewith and are so precise that it seems they must be controlling.

Now, in the judgment of the court, in order to make the act of 1907 a sensible, workable, constitutional piece of legislation, it is compelled to add to the help thereto afforded in *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, by holding, in the whole, that, when the legislature commanded the submission of certain questions on the subject of negligence, it did not intend to make them, necessarily, sufficient to settle the ultimate question of responsibility and could not, legitimately, prevent the submission of other questions necessary to fill out a case in that regard; and by further holding that the language of subd. 5: "In all cases under this act the question of negligence and contributory negligence shall be for the jury," must have added thereto, by necessary implication, something like this, when the facts in that regard are in such doubt that a jury on the evidence could reasonably find either way. Also the word "negligence," in each of the three legislative questions, must be read as, want of ordinary care, the word "directly" in the first two questions, must be read as proximately, and the words, "whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company," etc., read as, whether the want of ordinary care of the party injured was less and contributed less, proximately, to produce the injury than that of the company, etc., thus harmonizing the law with some rational idea of comparative negligence.

I cannot consent to the radical necessary changes of language indicated. I think it violates the plain intent of the act. Absurd almost, if not quite so, as the law is, viewed as I view it, I am constrained to believe that those who had to do with drafting it meant just what they said and nothing else.

I cannot convict them of having been so wanting in knowledge of legal principles, common even among laymen, as to have put words together as they did and yet intended the radically different meaning the court has ascribed to those words. I do not know of any instance of such changes from the literal sense of an enactment having been made in the name of judicial construction as have been made in this one. It seems to me the work has been one of reconstruction, which does less credit to the lawmaking power than would condemnation of the act altogether.

Looking at the act as I do, I cannot come to any other conclusion than the learned circuit judge did. Under the act, as I read it, the case had to turn on whether fault, as regards direct effects, regardless of degree otherwise, of the engineer, contributed, not proximately, with all elements that word implies, but directly in greater degree to produce the injury than like fault of the plaintiff likewise contributed. In other words, the question was, did defendant's fault, regardless of the quantum thereof, more than plaintiff's, at the instant of the collision, lend greater effectiveness, regardless of the elements of responsible causation as understood universally in the law of negligence, than did like fault on the part of plaintiff, to produce the result complained of. I think the members of the court would easily unite in saying that the evidence did not present any jury question on that subject; that when we come down to the instant of the injury, leaving out of view the degree of fault committed outside the period of time in which a collision was inevitable, the act of appellant was at least as promotive of the catastrophe as that of respondent.

The appellant knew the passenger train was nearly due and that it was necessary to go about his duty of setting out the special signals in such cases, in ample time for him to have performed that duty before such train entered the region of unavoidable danger. He neglected to do that without any

justification whatever. He heedlessly sat down in the caboose to take a lunch, even after considerable inexcusable delay. In short, he acted regardless of the imminent danger he was in. The engineer, at the worst, ran his train, mindful only of the special required indications of a train being in his way. If appellant, even after considerable inexcusable delay, had left his caboose, he would not have been injured. His being in the caboose without putting out the customary signals, and the engineer not running his train upon the theory that the men on the one ahead might neglect their duty, were the immediate causes of his injury. Respondent had every reason to expect the passenger train, and that the engineer thereof would expect to be intercepted by the special signals required under the circumstances. The latter had no reason to expect the freight train would be in his way, barring accidents, and then not without the special signals being out to warn him. How can one say, facing these premises which seem to be very clear, that at the instant the passenger train entered the space, rendering the accident inevitable, the degree of reasonable anticipation of a personal injury happening to some one was greater from the standpoint of the engineer than from that of appellant? I cannot, in any view, get beyond this point and appreciate how the learned trial court could not.

The respondent moved for a rehearing. In support of the motion there was a brief by *Greene, Fairchild, North & Parker,* attorneys, and *C. H. Van Alstine,* of counsel; and in opposition thereto a brief by *Wigman, Martin & Martin.*

The motion was denied February 1, 1910.

KINGSLEY, Respondent, vs. STEIGER, Appellant.

October 28, 1909—February 1, 1910.

Judgment: Opening default: Statutes construed: Power of court: Limitation of time: Defendant not personally served: Discretion: Showing necessary: Appeal.

1. Under sec. 2832, Stats. (1898), any defendant, whether he was personally served or not, may invoke the discretion of the court or judge to relieve him from a judgment at any time within one year after he has received notice thereof, without regard to the time when the judgment was rendered.
2. Under sec. 2833, Stats. (1898), a defendant belonging to the particular class therein mentioned may, upon proper showing, demand such relief as a right, within one year after notice of the judgment and within three years after its rendition.
3. *Gray v. Gates*, 37 Wis. 614, so far as it conflicts with the construction here given to secs. 2832, 2833, Stats. (1898), or with *Pier v. Millerd*, 63 Wis. 33, is overruled.
4. A party applying under sec. 2832, Stats. (1898), for relief against a judgment must show mistake, inadvertence, surprise, or excusable neglect. Mere lack of notice, together with a showing of a meritorious defense, is not sufficient.
5. Where, by reason of the want of a proper showing, it would have been an abuse of discretion to open a judgment under sec. 2832, Stats. (1898), the party applying for such relief was not prejudiced by an order denying his motion, and such order will be affirmed, although not made in the exercise of discretion but upon the ground that the court had no power to grant the application.

APPEAL from an order of the circuit court for Lincoln county: CHESTER A. FOWLER, Judge. *Affirmed.*

The appellant moved the court below, upon affidavits and verified answer, for an order opening the judgment previously rendered and allowing the appellant to defend the action. The affidavits set out in detail the obtaining of service by publication in the action commenced by plaintiff against the appellant, and want of notice upon the part of the appellant of such judgment or any proceedings resulting in such judgment until after the expiration of three years from the rendi-

tion thereof, and that judgment was rendered on the 11th day of April, 1905; that the appellant had no notice, knowledge, or information concerning the action until the 11th day of August, 1908. It is further stated in the affidavits that the newspaper in which the summons in the action was published was printed in the German language at the city of Merrill, Wisconsin, and is a paper of limited circulation, and that the plaintiff and his attorneys knew that the publication of said summons in said newspaper would be unlikely to give appellant notice. It is also averred that the action was not placed on the calendar of the court for the term at which it was tried, with design to keep knowledge thereof from the appellant, and that the judgment was not recorded in the office of the register of deeds until more than three years had elapsed from the date of the judgment. The verified answer sets up a good defense. The material allegations of appellant's affidavits are denied by the respondent. The only substantial ground for opening the judgment, as appears from the record on the motion, is want of notice to the appellant until after the expiration of three years from the rendition of the judgment sought to be opened. The court below denied the appellant's motion, on the ground that it had no jurisdiction to open the judgment and allow a party to defend where the judgment had been obtained upon service by publication, after the expiration of three years from the rendition thereof.

For the appellant there were briefs by *G. M. Sheldon,* attorney, and *Ryan & Runke,* of counsel, and oral argument by *Mr. Sheldon.*

For the respondent there was a brief by *Smart, Van Doren & Curtis,* and oral argument by *E. M. Smart.*

The following opinion was filed December 7, 1909:

KERWIN, J. The court below denied the application to open the judgment on the ground that it had no jurisdiction after the expiration of three years from rendition of judg-

ment, and based its opinion on sec. 2833, Stats. (1898), and *Gray v. Gates,* 37 Wis. 614.

1. The provisions of the statutes involved read as follows:

"Sec. 2832. The court or a judge may likewise, in discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him, through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceedings; and whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of law the court may, in like manner and upon like terms, permit an amendment of such proceeding so as to make it conformable thereto.

"Sec. 2833. When service of the summons shall have been made by publication, if the summons shall not have been personally served on a defendant nor received by such defendant through the postoffice, he or his representative shall, on application and good cause shown, at any time before final judgment, be allowed to defend the action; and, except in an action for divorce or annulment of the marriage contract, the defendant or his representative shall in like manner, upon good cause shown and such terms as shall be just, be allowed to defend after final judgment at any time within one year after actual notice thereof and within three years after its rendition. If the defense be successful and the judgment or any part thereof shall have been collected or otherwise enforced such restitution may thereupon be compelled as the court shall direct; but the title to property, sold under such judgment to a purchaser in good faith, shall not thereby be affected."

Gray v. Gates, 37 Wis. 614, holds flatly that sec. 2833 rules in all cases of service by publication as therein provided, and that the court had no power over the judgment after the close of the term, except that given by sec. 2833, and that the periods of one and three years specified in this section are limitations upon the power of the court. The court below rested its opinion on this case.

In *Pier v. Millerd,* 63 Wis. 33, 22 N. W. 759, without re-

ferring in any way to *Gray v. Gates, supra,* the supreme court ruled directly opposite, and held that sec. 2832 applies to all cases, whether service is by publication or personal, and that sec. 2833 refers to matter of right, and that discretionary power over judgments more than three years old, upon a proper showing, may be exercised by courts under sec. 2832 to relieve from judgments founded on service by publication as well as from judgments based on personal service. But in the last-named case the judgment was on personal service, so that the point, though flatly decided, was not necessary to the decision of the case. So we now have two decisions in apparent conflict upon the construction of the statutes heretofore referred to. While no attempt is made in the latter case to reconcile it with the former, it is argued by counsel for appellant that a change in the statute (sec. 2833) subsequent to *Gray v. Gates, supra,* and prior to *Pier v. Millerd, supra,* so as to make its terms mandatory instead of discretionary, reconciles the decisions. There is considerable force in this contention, because by the terms of sec. 2833, since the amendment, a defendant of the class to which the section refers "shall," on application and good cause shown, be allowed to defend at any time within one year after actual notice and within three years after rendition of the judgment; while under sec. 2832 relief rests in the sound discretion of the court. In *Pier v. Millerd,* 63 Wis. 33, at page 37, 22 N. W. 761, the court said:

"No good reason is perceived why a defendant not personally served with the summons may not invoke the discretion of the court or judge, conferred by sec. 2832, to relieve him from a judgment, as well as a defendant upon whom the summons was personally served. We think the true scope and meaning of the two sections is that under sec. 2832 any defendant may invoke the discretion of the court or judge to relieve him from a judgment at any time within one year after he has received notice thereof, without regard to the time the judgment was rendered; while under sec. 2833 a de-

fendant belonging to the particular class therein mentioned may, on proper application and showing, demand such relief as a right, if he do so within one year after notice of the judgment and within three years after its rendition. The section evidently gives a remedy to defendants not served with process which it does not give to those who were so served, while the remedy given by sec. 2832 is common to all defendants, whether personally served or not."

We think this is the proper construction of the statutes, and see no reason for departing from it, and in so far as *Gray v. Gates,* 37 Wis. 614, conflicts with this opinion or with *Pier v. Millerd, supra,* it must be regarded as overruled. It is possible, as before observed, that the change in the statute may operate to reconcile the decisions, since before *Gray v. Gates* was decided the statute (sec. 2833) was not in terms mandatory, while it was by the change when *Pier v. Millerd* was decided. It follows, therefore, that the court below had jurisdiction under sec. 2832, Stats. (1898), upon a proper showing, to open the default and permit the appellant to defend.

2. The next question is whether the appellant was prejudiced by the order of the court in denying the motion. It is insisted by counsel for appellant under this head that the court below in the exercise of its discretion should have granted the motion. The court below not having exercised its discretion on the question of allowing the defendant to answer, we must be able to say that the appellant is not prejudiced by the order, or it should be reversed and the case sent back to allow the court below to pass upon the question. This requires an examination of the record and questions of fact and law arising thereon. After the expiration of three years from the rendition of the judgment in question it was incumbent upon the defendant, under the provisions of sec. 2832, Stats. (1898), in order to arouse the jurisdiction of the court to open the default, to show "mistake, inadvertence, surprise or excusable neglect," and upon such showing the court "may" relieve the party from the judgment complained of.

Sec. 2833, as we have seen, gives the party against whom judgment is entered by default on service by publication three years within which to move for relief as matter of right, but after the expiration of this time such party stands upon the same ground as if there had been personal service, and must make a showing under sec. 2832. The question, therefore, arises whether such a showing was made in this case as would warrant the court in relieving from the judgment. The appellant cannot rest her right to relief, in whole or in part, upon the fact that she was not personally served and had in fact no notice. That ground is foreclosed by the three-year limitation provided in sec. 2833, and the appellant here stands solely upon sec. 2832, and must show mistake, inadvertence, surprise, or excusable neglect. Has she done so? The only substantial showing made upon the motion, as we have seen from the statement of facts, is based upon the want of personal service or notice to appellant of the proceedings resulting in the judgment. These facts are not available to open the judgment after three years, but the appellant must make a case independent thereof showing mistake, inadvertence, surprise, or excusable neglect, and there is no attempt to do so in the record before us. If a defendant against whom judgment was rendered on service by publication could come in at any time and open the judgment merely because of want of notice of the judgment, there would be little stability in a judgment obtained by substituted service. And so we think the very object of the statute (sec. 2833) was to foreclose the right after three years on account of the mere fact of want of notice, but at the same time leave sec. 2832 applicable to all parties when a proper case is made. Obviously the appellant proceeded upon the theory that the lack of notice, together with a showing of a meritorious defense, was sufficient. But this is a mistaken idea. Sec. 2833 provides a limitation upon that ground, at the expiration of which time the party against whom judgment is rendered in the manner therein provided is barred from opening it on the

ground of want of notice alone. No facts were stated bringing the appellant within the provisions of sec. 2832. Therefore it would have been an abuse of discretion on the part of the court below to have opened the judgment. While the court below denied relief upon another ground, its order was right and must be affirmed.

By the Court.—The order below is affirmed.

BARNES, J., took no part.

Upon a motion for a rehearing appellant contended, *inter alia,* that there had been a sufficient showing of *surprise,* under sec. 2832, Stats. (1898).

The motion was denied February 1, 1910.

LIPPERT, Special Administrator, Appellant, vs. JOSEPH SCHLITZ BREWING COMPANY, Respondent.

January 10—February 1, 1910.

Negligence: Unsafe premises: Injury to invitee: Master and servant: Injury to third person: Accident: Appeal: Estoppel to allege error.

1. Premises cannot be said to have been unsafe as to a person thereon by invitation, so as to render the owner liable on that ground for an injury to such invitee, if no injury could have befallen the latter merely from the condition of the premises or the ordinary conduct of the business thereon, without the intervention of some responsible negligent human agency.
2. For injuries to a third person caused by pieces of a broken glass bottle thrown by a servant as a result of an accidental explosion, the master is not liable. [Whether the master would be liable if the explosion was not an accident, but an ordinary and usual occurrence which in the exercise of ordinary care he should have anticipated and guarded against, not determined.]
3. Plaintiff cannot complain of the admission of incompetent evidence offered by himself, which showed the nonliability of the defendant, although had such evidence been excluded the other evidence might have established his case.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Rubin & Zabel,* and oral argument by *W. C. Zabel.* They cited, among other authorities, *Dorsey v. Phillips & C. C. Co.* 42 Wis. 583; *Olson v. Doherty L. Co.* 102 Wis. 264, 78 N. W. 572; *Hazen v. West Superior L. Co.* 91 Wis. 208, 64 N. W. 857; *Dugal v. Chippewa Falls,* 101 Wis. 533, 77 N. W. 878; *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633; *Leque v. Madison G. & E. Co.* 133 Wis. 547, 113 N. W. 946; *Bessex v. C. & N. W. R. Co.* 45 Wis. 477; *Bright v. Barnett & R. Co.* 88 Wis. 299, 60 N. W. 418; *Hupfer v. Nat. D. Co.* 114 Wis. 279, 90 N. W. 191; *Huber v. La Crosse City R. Co.* 92 Wis. 636, 66 N. W. 708; *Yerkes v. N. P. R. Co.* 112 Wis. 184, 88 N. W. 33; *Crites v. New Richmond,* 98 Wis. 55, 73 N. W. 322; *Hocking v. Windsor S. Co.* 125 Wis. 575, 104 N. W. 705; *McDougall v. Ashland S. F. Co.* 97 Wis. 382, 73 N. W. 327.

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *E. S. Mack.* Besides other cases, they cited *Fisher v. Franklin,* 89 Wis. 42, 61 N. W. 80; *McGinn v. French,* 107 Wis. 54, 82 N. W. 724; *Prideaux v. Mineral Point,* 43 Wis. 513; *Stackman v. C. & N. W. R. Co.* 80 Wis. 428, 50 N. W. 404; *Kraeft v. Mayer,* 92 Wis. 252, 65 N. W. 1032.

TIMLIN, J. The defendant brewing company contracted with one Toepfer for the construction by the latter of a large upright iron tank extending from some feet below the basement floor through the basement ceiling and floor of the room above. This necessitated the cutting of a somewhat circular hole through said ceiling and floor larger than the tank and leaving an open space around the circumference of the tank. On this upper floor employees of the respondent were engaged in a process called "pasteurizing" beer for bottling. In this

operation bottles were frequently broken, and in the progress of their work the employees threw this broken glass into a box resting on this upper floor near the opening aforesaid. When the box was filled with broken glass it was removed, emptied, and replaced for the further reception of broken glass. The appellant, an employee of Toepfer, was engaged in heating and fitting rivets into the tank in process of construction. Toepfer and his men were in the basement and working on the tank by invitation of the respondent. The representative of the respondent was notified by Toepfer or some one representing him not to let this broken glass down on Toepfer's workmen. While the plaintiff was standing on a plank in the basement engaged at work, some of this broken glass came down through the opening aforesaid, fell on his bare arms and cut them, caused him to drop off the plank, and thereby to sustain personal injuries. Although twice excluded by rulings of the trial court, the plaintiff finally succeeded in getting in without objection testimony on his part that immediately after the accident he went up on the other floor looking for respondent's superintendent or foreman, found a boy there, showed the boy his bleeding arm, and the boy said, "The bottle—I couldn't hold the bottle, it exploded on me, and I threw it." The court below ordered a judgment of nonsuit.

This case is presented by both appellant and respondent largely as if it involved the question of an unsafe place and the duty of the owner of the premises toward one on his premises by invitation under such circumstances. That does not appear to us to be the question in the case. The premises were not unsafe as to the plaintiff, nor was the plaintiff injured in consequence of any omission on the part of the owner in that regard. Where, without the intervention of some responsible negligent human agency, no injury can befall the invitee merely from the condition of the premises or the ordinary conduct of the business thereon, such premises cannot

be said to be unsafe. If the dangerous character of the premises is predicated upon placing the box for the reception of broken glass too near the opening in the ceiling, such dangerous condition must result from a method of placing the broken glass in the box which would be apt to cause the broken glass to spill over the box and fall down the opening. But there is no proof of the method employed. This hole did not cause the broken glass to come down. It was a mere condition which made the negligent dropping or throwing of the glass effective to produce the injury. The case might be different if this hole could cause something to fall on the plaintiff without the intervention of a responsible negligent human agency. The case seems to present the question of the liability of the master to third persons on account of the wrongful or negligent act of his servant. It is quite possible that the declarations of the boy were not admissible as *res gestæ*. But see *Bass v. C. & N. W. R. Co.* 42 Wis. 654, and *Hooker v. C., M. & St. P. R. Co.* 76 Wis. 542, 44 N. W. 1085. In any event, the party offering the evidence cannot complain on that ground. If this declaration had been omitted from the plaintiff's case there might have been sufficient circumstantial evidence from the nature of the work, the location and position of the box for the reception of broken glass, and the falling of the glass, to sustain a finding that the servant of the defendant, in the discharge of his duty and in attempting to throw the broken glass into this box, negligently threw the glass so that it went over the box and into the opening before mentioned and down upon the plaintiff. This would call for an application of the rule *respondeat superior*. But with this explanation of the boy showing that the fall of the glass was the result of accident the nonliability of the superior was shown. *Wall v. Lit,* 195 Pa. St. 375, 46 Atl. 4. What the result would have been had the appellant produced evidence that the explosion of the bottle was not an accident, but an ordinary and usual occurrence which the defendant in the

exercise of ordinary care should have anticipated and guarded against, we do not decide. There is evidence tending to show that many bottles were broken in the operation, but the only evidence on the question of explosion is contained in the following question and answer: "*Q.* Does it *ever happen* that these bottles when being taken out of the pasteurizing tanks explode? *A.* Oh, yes; accidents happen."

The plaintiff died pending this appeal, and his administrator was substituted as plaintiff upon suggestion of the death.

The judgment of nonsuit must be affirmed.

By the Court.—It is so ordered.

BERNDT, Respondent, vs. CITY OF CUDAHY, Appellant.

January 11—February 1, 1910.

Highways: Injury from defect: Inaccurate notice: Intent to mislead, etc.: Questions for jury: Special verdict.

1. The questions whether a notice of injury, given under sec. 1339, Stats. (1898), which inaccurately described the defect in the highway, was intended to mislead and whether it did actually mislead the defendant, are ordinarily for the jury.
2. Evidence in this case showing, among other things, that the erroneous description resulted from the failure of plaintiff's attorney to understand his client, with whom he could communicate only through an interpreter, established the fact that there was no intent to mislead; and other evidence was sufficient to sustain a finding by the jury that defendant was not in fact misled.
3. Where the special verdict fully covers all the issues properly for the jury, the refusal to submit other questions was not error.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action for personal injuries resulting to the plaintiff by being thrown from a wagon upon an alleged defective highway

in the defendant city March 21, 1905. The action was tried before a jury and a special verdict rendered finding: (1) The highway was not reasonably safe for public travel for persons with teams, exercising ordinary care. (2) The defendant had notice of the insufficiency, so that in the exercise of reasonable diligence it might have remedied it before the plaintiff's injury. (3) The unsafe condition of the highway was the proximate cause of plaintiff's injury. (4) He was not under the influence of intoxicants at the time. (5) He was not guilty of contributory negligence. (6) Defendant was not misled by the notice of injury served. (7) Plaintiff's damages were $2,500. Upon motion the trial court ordered a new trial unless plaintiff remitted $1,000 of the damages, which being done judgment was rendered for the plaintiff for $1,500 and costs, and defendant appeals.

F. X. Boden, for the appellant.

For the respondent there was a brief by *Carroll & Carroll,* and oral argument by *Geo. J. Carroll.*

WINSLOW, C. J. The principal, and really the only serious, error claimed by the defendant is that the notice of injury given by the plaintiff to the defendant, under sec. 1339, Stats. (1898), was fatally defective, in that it described the defect in the highway into which the plaintiff's wagon ran as an excavation which had been so negligently and loosely refilled that the surface gave way and the wheel of plaintiff's wagon suddenly sank down therein to a great depth; while the complaint and proofs showed the defect, if any, to have been a hole in the highway filled with mud and water, into which the wheel of defendant's wagon plunged. It was admitted that the notice in all other respects was sufficient.

The statute (sec. 1339, Stats. 1898) provides that the notice shall not be held insufficient solely because of any inaccuracy or failure in properly describing the place or the insufficiency or want of repair, provided it appear that there

was no intention on the part of the injured party to mislead the other party and that such other party was not in fact misled. Generally speaking, the question whether such intent to mislead existed, as well as the question whether the defendant was in fact misled, are both questions for the jury. In the present case the cause of the erroneous description in the notice was very fully explained in the evidence, and it appeared without dispute that it resulted from a failure on the part of the plaintiff's counsel to understand his client, who talked only German and could communicate with his counsel only through an interpreter, and the evidence was plenary that there was no intention to misstate the facts in the notice. The jury would not have been justified under the evidence in finding such an intention. The trial judge submitted the question as to actual misleading to the jury, and it was answered in the negative.

It is argued that the evidence showed conclusively that the town officers were misled, but we cannot agree with this contention. There was evidence that the street commissioner of the city was at the place and saw the hole four days before the accident, that a piece of board was stuck in the hole soon after the accident, and was there standing in a slanting position for two weeks thereafter and at the time when the city committee went to examine the place after receiving the notice of injury. While there was also evidence that the committee saw no hole on this occasion, the evidence above stated was sufficient to entitle the jury to find that the defendant was not misled.

Complaint is made because certain questions proposed by the defendant were not submitted to the jury in the special verdict, but we find it unnecessary to specifically consider these questions, for the reason that the verdict as framed fully covers all the issues of fact properly for the jury.

We do not find it necessary to consider any other contentions except the contention that the damages, even after being

cut down by the trial judge, are excessive. We should have been better pleased had the damages been further reduced, but the trial judge had long experience at the bar and is well fitted to form a just estimate of the damages suffered. In deference to his opinion, which was evidently arrived at after mature thought and care, we do not feel justified in reducing them further.

By the Court.—Judgment affirmed.

WEST ALLIS LUMBER COMPANY vs. WIESENTHAL, Appellant, and SMITH-BLODGETT COMPANY, Respondent.

January 11—February 1, 1910.

Liens: Notice by subcontractor: Right of owner to setoffs: Pleading: Counterclaim.

1. Sec. 3315, Stats. (1898), as to stating, in the subcontractor's notice, the amount due, is satisfied by such substantial compliance therewith that the person served with notice can readily determine therefrom the correct amount.
2. In an action to enforce a subcontractor's lien, the owner of the building is entitled to the benefit of all deductions from the claim which the principal contractor might rightfully insist upon, including damages for failure to properly perform the subcontract.
3. In an action to enforce a subcontractor's lien, damages for nonfulfilment of the subcontract may be claimed by the owner of the building as an offset, and pleaded as such in the form of a counterclaim.
4. Matter of offset must, in any case, be pleaded as a counterclaim.
5. If facts pleaded as an offset in the form of a counterclaim do not constitute a cause of action in favor of the party pleading them, the pleading is not demurrable for insufficiency though relief to the extent of a judgment in favor of such party is demanded.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Action to foreclose a subcontractor's lien under ch. 143 (secs. 3314–3347*a*), Stats. (1898). With the proprietor (*Wiesenthal*) and the principal contractor (Potter), *Smith-Blodgett Company,* a corporation, was made a defendant upon the ground of its claiming a like lien. The complaint was in the usual form. The defendant lien claimant answered setting up its demand and praying for appropriate relief. The answer was duly served upon all parties concerned.

A subcontractor's notice was served by *Smith-Blodgett Company* for the purpose of complying with sec. 3315, Stats. (1898). In respect to the statutory requirement for such notice to state the amount due the subcontractor from the principal contractor, the writing showed by appropriate words that the subcontractor performed for the principal contractor lienable work and furnished him lienable material in constructing the dwelling house in question of the value of $412.73, referring to an exhibit made part of the notice. Such exhibit contained an itemized statement of $697.73, upon which was credited $285, and a balance brought down of $412.73, opposite the words "Balance due."

The proprietor answered the demand of defendant lien claimant, putting in issue the allegations of its pretended cause of action, and further pleading, in the form of a counterclaim, a setoff to the effect that the subcontractor agreed with the principal contractor to put in the heating plant and do the plumbing work in the building in first-class workmanlike manner, with such material as the contract called for; that in breach thereof it failed to do good work or to use good material or install the heating plant as agreed, rendering the house as completed, of less value than it otherwise would have been, to the extent of $500, for which judgment was demanded against the subcontractor with costs.

The counterclaim was duly replied to.

The court ruled on the trial that the notice was sufficient and that the owner of the building could not counterclaim

against the subcontractor's demand for the damages his creditor might have for failure to carry out the contract.

The court found in favor of the proprietor on plaintiff's cause of action for want of proper service of the notice of lien, but found in favor of *Smith-Blodgett Company* on its claim, and ordered judgment accordingly. The amount of such claim with costs was $298.47, which included the full amount mentioned in the notice less $200 paid after service thereof. The proprietor appealed.

For the appellant the cause was submitted on the briefs of *F. C. Weed.*

For the respondent there was a brief by *Holt & Coombs,* attorneys, and *John J. Cook,* of counsel, and oral argument by *A. N. Coombs.*

MARSHALL, J. The subcontractor's notice to the proprietor did not, with commendable fulness, comply with the requirement of sec. 3315, Stats. (1898), as to stating the amount due from the principal contractor; but it did comply therewith substantially. There was no difficulty in determining therefrom and the statement, made a part of it, the exact amount claimed to be due. That was sufficient. Such compliance satisfied the statute. *Hausmann Bros. Mfg. Co. v. Kempfert,* 93 Wis. 587, 67 N. W. 1136; *Chandler L. Co. v. Fehlau,* 137 Wis. 204, 117 N. W. 1057.

The learned circuit court committed fatal error in ruling that the owner of the building could not reduce the claim of the subcontractor by offsetting damages for breach of his contract with the principal contractor, pleaded in the form of a counterclaim. The proposition involved is ruled by the statute itself (sec. 3315, Stats. 1898), and by *Seeman v. Biemann,* 108 Wis. 365, 376, 84 N. W. 490. It was said by the court in the *Seeman Case,* that in an action to enforce a subcontractor's lien under the statutes of this state, the owner of the property affected is entitled to the benefit of all the

defenses against the claim possessed by the principal contractor; referring to the statute. The term "defenses" as there used includes all claims by way of setoff which the principal contractor has against the subcontractor. True, the proprietor cannot obtain an affirmative judgment against the subcontractor in the right of the principal contractor, but he can have full benefit of the setoff, which is pleadable as a counterclaim. *Schumacher v. Seeger,* 65 Wis. 394, 27 N. W. 30. The statute expressly so provides:

"In actions in courts of record a setoff claimed by the defendant shall be pleaded as a counterclaim and regulated by the rules of pleading and practice applicable to counterclaims. . . ." Sec. 4264, Stats. (1898).

The learned court overlooked the fact that this court decided in *Seeman v. Biemann, supra,* that the property owner, in a case of this sort, has all the rights of the principal contractor as to such matters as will qualify or defeat the claim of the lien claimant; and further overlooked the fact that matter of setoff is to be treated, in pleading, the same as a counterclaim; and, further, that where the facts constitute a good setoff in favor of the party pleading them, but do not constitute a cause of action in his favor against the complainant, the pleading setting up the setoff in form as a counterclaim, is not demurrable for insufficiency, although it improperly demands an affirmative judgment. *Schumacher v. Seeger, supra.*

By the Court.—The judgment is reversed, and the cause remanded for further proceedings in respect to the appellant's claim of setoff and for judgment according as the facts in that respect and those heretofore found, may appear.

HACKETT, Administrator, Respondent, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Appellant.

January 12—February 1, 1910.

Railroads: Death of employee: Negligence of co-employee: Assumption of risk: Line of duty: Contributory negligence: Rules: Duties of firemen: Defects in track: Evidence: Special verdict: Instructions to jury: Damages: Mortality and annuity tables.

1. Under our statutes a railway employee in the line of his duty does not assume the risk of negligence in a co-employee except perhaps in a case where he knowingly, voluntarily, and unnecessarily submits himself thereto.
2. A railway fireman riding in an engine as his duty required did not cease to be acting in the line of his duty, within the meaning of our statutes, merely because he performed some negligent act in the course of his conduct.
3. From the facts that after an engineer and fireman were in their places the engineer increased the speed of the engine to an excessive and dangerous degree, and that the fireman did nothing except to call the engineer's attention to the speed, it cannot be inferred that the fireman co-operated in the negligent act or that he consented thereto at a time when he might have withdrawn himself from the danger; nor can it from those facts be said that the fireman was guilty of negligence, he being subject to the command and control of the engineer.
4. The fireman in such case was not required to interfere further than he did with the engineer's operation of the engine, by rules addressed to all employees of the railway company, calling attention to their general duty to be careful and to avoid danger and to the duty of one employed with another to caution such other of risks which he is about to encounter.
5. Such general rules must be deemed controlled, so far as they conflict, by special rules addressed to the firemen, which provided specifically that while on duty the firemen are subject to the directions of their own engineers.
6. Where the death of a fireman was alleged to have been caused by the negligence of an engineer in running his engine at an excessive speed, resulting in its derailment, evidence as to the generally weak and defective condition of the track in places in close proximity to the point of derailment, and that heavy engines had recently been run over the road, tending to increase such defects, was admissible on the question of the engineer's negligence.

7. In a question in a special verdict as to discovery of defects in a railway track, the use of the expression "reasonably proper care, test, or inspection" instead of "ordinary care and prudence," or instead of "reasonable and proper care, test, and inspection" (sec. 1816, Stats.: Supp. 1906), was not prejudicial error.
8. Refusal to submit certain questions for special verdict is not error where there is no evidence which would sustain findings thereon favorable to the party requesting such submission.
9. It is not error to refuse to submit in the special verdict a proposed question relating to a matter which is not within the issues but is a mere evidentiary fact bearing upon a subject covered by a question duly submitted.
10. Where the court submitted in the special verdict the question whether "a want of ordinary care" on the part of a person contributed to his injury, it was not error to refuse to submit a proposed question as to whether such person's "own *slight* want of ordinary care" so contributed.
11. It is not the duty of the trial court to select individual items of evidence and embody them in instructions.
12. Upon the question in a special verdict whether want of ordinary care on the part of a person contributed to his injury, the court properly refused a requested instruction that carelessness and negligence on his part, no matter how slight, if it directly caused or contributed to the accident, would necessitate an affirmative answer. The use of the word "directly," instead of "proximately," was incorrect; and the instruction conveyed the erroneous idea that slight negligence constitutes want of ordinary care.
13. Where decedent had contributed to the support of his parents, mortality and annuity tables may be admissible in evidence as an aid in estimating their future damages on account of his death, but the subject is not one for mathematical computation, especially where the parents had no legal right to any contribution.
14. Where an adult unmarried son, employed as a locomotive fireman, had voluntarily contributed an amount not exceeding $150 per year to the support of his parents, the younger of whom was fifty-one years old, and who were not dependent upon and had no legal right to such contribution, an award of $4,500 as damages to the parents for his death is *held* excessive, but option is given to remit therefrom all in excess of $2,500.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Plaintiff's decedent, a fireman, was on a work engine of the defendant September 10, 1906, with the engineer and a passenger. The engine and tender were detached from the work train. The work crew and conductor were on the tender. The engineer proceeded to back up westward from Weyauwega to Waupaca. This was done at an increase of speed reaching, as estimated, sixty or seventy miles an hour, until the tender mounted the track, ran to one side and tipped the engine over, killing both the fireman and engineer. The complaint alleged negligence in that the track was defective and the engine was carelessly run by the engineer and conductor in charge thereof. The jury found that (1) the track of the defendant at the place of injury was in a defective and unsafe condition; (2) such defect could have been discovered by defendant by reasonably proper care, test, or inspection; (3) engineer operated the locomotive in a careless and negligent manner; (4) such facts were the proximate cause of the injury and death; (5) deceased was engaged in the line of his duty as employee; (6) the injury arose from a risk or hazard peculiar to the operation of railroads; (7) no want of ordinary care or prudence on the part of the deceased contributed to the injury; (8) deceased contributed to his parents $250 a year; and (9) damages $4,500. After the usual motions for direction and correction of verdict, judgment *non obstante,* and new trial, judgment was entered for the plaintiff for $4,500 and costs, from which the defendant appeals.

For the appellant there were briefs by *Walter D. Corrigan, W. A. Hayes,* and *Clifton Williams,* and oral argument by *Mr. Corrigan.*

For the respondent there was a brief by *Stewart & McDonald,* and oral argument by *F. C. Stewart.*

The following opinion was filed February 1, 1910:

DODGE, J. 1. Appellant's first contention is that verdict and judgment for the defendant should have been ordered

upon undisputed evidence. This general contention is supported on various asserted grounds, among which is the doctrine of assumption of the risk. But under the existing statutes in this state a railroad employee, in the line of his duty, does not assume the risk of negligence in a co-employee, except perhaps in the case where he knowingly, voluntarily, and unnecessarily submits himself thereto.

Again, it is asserted that the deceased was not in the line of his duty as an employee. His duty required him to ride in the engine from Weyauwega to Waupaca, and he was doing just that. He did not cease to be acting in the line of his duty, within the meaning of our statutes, even if he performed some negligent act in the course of his conduct. *Kunza v. C. & N. W. R. Co.* 140 Wis. 440, 123 N. W. 403. The evidence, instead of conclusively establishing that he was not in the line of his duty, we think was conclusive the other way.

Further, appellant contends that deceased co-operated and confederated with the engineer in the performance of the latter's negligent act, which was the running of the train at an excessive and negligent speed. We have no doubt that if there had been affirmative agreement or even consent by the deceased, in advance, to such running, recovery would be prevented both under the rule *volenti non fit injuria* and on the ground of contributory negligence. We, however, find no evidence justifying more than a conjecture of any such fact. The sum total of the evidence is that after engineer and fireman were in their places the engineer increased the speed of the engine to an excessive and negligent degree; that deceased did nothing except to call the engineer's attention to the speed. From these facts there can be no legitimate inference that he either agreed with, or encouraged, the engineer to such negligence, or that he consented thereto at a time when a protest could have been rendered effective by withdrawing himself from the danger.

A further contention that deceased is conclusively convicted of contributory negligence is met by much the same considerations. If he had no knowledge before taking his seat in the cab that an excessive and negligent rate of speed was intended, he had no opportunity at any time after discovering such intent or conduct to take any effective precautions. He could not leave the engine nor could he control the engineer's conduct, unless perhaps he were of preponderant physical power, a fact which was not established. Besides, he was subject to the command and authority of the engineer, who had larger experience and was vested by the rules of the company with full control over his conduct as an employee. If it was his duty, in the exercise of due care or under the rules, to caution the engineer of a danger so obviously within the latter's knowledge, the evidence at least tends to establish that he did so. The proof is undisputed that both he, and the other occupant of the cab in his presence, called the engineer's attention to the very high rate of speed; had loud talk "how he was hitting her" or "batting her," in the language of the witness. The assertion by counsel that such remarks were made jestingly or by way of encouragement is without support from the testimony; indeed is in defiance of express contradiction.

The remaining basis for this general contention of appellant is that the deceased's conduct was somehow in breach of divers and sundry rules of the company. We are cited to a half dozen rules addressed generally to all employees of the railroad company calling attention to the hazardous nature of their employment and their general duty to be careful both for themselves and for others, and duty of one who is employed over or with another to caution such other of risks which he is about to encounter. As counsel construes these rules, the business of railroading could hardly be carried on with a celerity equal to the ancient stage coach. If they have been promulgated by the company in the literal and extreme sense which they assume in court, the conclusion would be

irresistible that they have been promulgated for the purpose of being broken instead of obeyed in many respects. It is very certain that an employee who obeyed all of them to the letter would not make his services of much value in the business of railroading as it is customarily conducted within common knowledge. However, these glittering generalities in regard to general duty of caution and avoiding of danger in a business where exposure to danger is continuously required of employees must be deemed controlled, so far as they conflict, by the special rules addressed to the firemen, which provide primarily and specifically that "while on duty they are subject to the directions of their own engineers. . . . Each engineer is held responsible for the engine under his charge." "Engineers must not allow others to handle their engines, except their own firemen, the engineer remaining upon the engine and being held responsible." Firemen shall, "when not engaged with other duties, assist in keeping a constant lookout, and will instantly give their engineer notice of any obstruction which they may perceive, or of any signals observed from other trains, or in case they shall have reason to believe their trains have parted, they will immediately notify their engineers of the same." We can find nothing in these rules to justify the view that it was the duty of the fireman to attempt to control, or interfere with, the engineer's operation of his engine; at most, further than to call his attention to that operation, which was done by the deceased. It is difficult to conceive any other act reasonably possible to the fireman which he could fairly believe would be effective. Having called attention to the excessive speed, could he suppose the engineer would be affected by a lecture upon the perils of such speed from himself, an inferior in responsibility, in knowledge, and in experience? Counsel assures us that such perils are known of all men; then surely by an experienced engineer, once he is informed of the fact of the high speed. The only other course open to the fireman was to take in his own hands

the running of the engine in defiance of express rules, and possible only in case he could physically overpower his superior. Such steps are manifestly so unreasonable and absurd that they cannot be declared as matter of law essential to the conduct of an ordinarily prudent person under the circumstances disclosed. We cannot agree with counsel that the evidence is at all conclusive of any failure on the part of the deceased to exercise ordinary care.

2. Error is assigned upon the admission of evidence as to the generally weak and defective condition of the track at places in close proximity to that of derailment but not identical therewith. Doubtless it is true that existence of a specific defect in the track causing the injury is not legitimately proved by establishing defects elsewhere. But in this case was presented the question of the engineer's negligence in running the train; that negligence was dependent upon all the surrounding facts and circumstances, among which would unquestionably be the condition of the track. The defects were all of a generally existing character, such as inferiority of ties, their insecurity in the ground, and loosened condition of the spikes, the last two of which at least were shown to result progressively from the operation of trains over the track. We think, therefore, the evidence was clearly admissible for some purpose and no error was committed in receiving it. Its effect might have been restrained by instructions to the jury had defendant so desired and requested. The same considerations apply to the admitted evidence of the recent running over the road of large engines; the excessive effect of such engines in producing or increasing the defects in the track above mentioned being made apparent.

3. Criticism is made of the phraseology of two or three questions in the special verdict: first, as to the use of the expression "reasonably proper care, test, or inspection," instead of "ordinary care and prudence," in discovering the defects in the track by the defendant. We think these expressions are

so nearly equivalent, especially in the light of *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 311, 80 N. W. 644, that we certainly cannot say that the use of one instead of the other has so obviously affected the substantial rights of the appellant as to justify reversal in the face of ch. 192, Laws of 1909 (sec. 3072*m*, Stats.). Indeed the statute in 1906 (sec. 1816, Stats.: Supp. 1906) predicated liability upon a test still more closely equivalent to the verdict. The other criticisms of the verdict are disposed of by what has been said elsewhere.

4. Errors are assigned upon the refusal to submit by verdict certain questions requested by appellant. The first of these was whether deceased did "co-operate with said engineer in the operation of said engine in a careless and negligent manner." As we have said, we do not find any evidence from which, by legitimate inference, an affirmative answer to this question could have been reached. The second is: Did the deceased "approve of and acquiesce in the operation of said engine in a careless and negligent manner?" So far as this question is to be construed as referring to affirmative agreement or declared approval in advance, it must be controlled by the reasons just expressed as to the preceding one. So far as it relates to a mental state of tacit submission or acquiescence, it is not within any of the issues raised by the pleadings, but relates to a mere evidentiary fact bearing upon the negligence of deceased, a subject covered by a question duly submitted. Therefore its refusal was without error. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 313, 80 N. W. 644; *Blankavag v. Badger B. & L. Co.* 136 Wis. 380, 386, 117 N. W. 852. Another question was requested submitting to the jury whether deceased's "own slight want of ordinary care" contributed to produce the injury. The question in fact submitted was whether "a want of ordinary care" so contributed. Of course the question submitted included that requested. A slight want of ordinary care is a want of ordinary care. Under the

broad discretion of the trial court over the form of the questions in the special verdict, we cannot hold that the adoption of one phrase in preference to the other is an error. *Mauch v. Hartford,* 112 Wis. 40, 42, 54, 58, 87 N. W. 816. Another question, whether the danger was open and obvious to a person in the fireman's situation, was properly refused because wholly immaterial. There was nothing in the situation suggestive even of the idea that any escape for him was possible after the danger arose. This is but a repetition of the contention in favor of the application of the doctrine of assumption of the risk, which we have already treated.

5. Defendant requested many instructions and now assigns error upon the refusal of some of them. Several are for direction of answers to certain questions and are within the preceding discussion. With reference to contributory negligence, an instruction was requested that an affirmative answer be given if deceased unnecessarily and voluntarily exposed himself to a known danger. Refusal of this was proper for the reason, already stated, that there was no evidence that deceased had any means of escape after the danger was known, so that his exposure could not be either voluntary or unnecessary. Another instruction that certain acts of the deceased, some of which were in dispute, would necessitate an affirmative answer was properly refused: first, because it is not the duty of a trial court to select individual detail items of evidence and embody them in instructions (*Sullivan v. Mauston M. Co.* 123 Wis. 360, 363, 101 N. W. 679; *Horr v. C. W. Howard Co.* 126 Wis. 160, 164, 105 N. W. 668); and secondly, because various of the acts therein referred to might or might not have been conclusive of negligence on decedent's part according to other circumstances and facts. Further, on the subject of contributory negligence an instruction was requested that "carelessness and negligence of deceased, no matter how slight," if it directly caused, or contributed to, the accident, would necessitate an affirmative

answer. The refusal of the request was proper, because the instruction was erroneous. It referred to negligence "directly" causing, or contributing to, the accident, instead of proximately, which in itself is incorrect. *Mauch v. Hartford,* 112 Wis. 40, 42, 87 N. W. 816. Further than this, however, it conveyed the idea that slight negligence constitutes want of ordinary care—a proposition early negatived in this court. Want of ordinary care is negligence. Want of extraordinary care, or that care which is customarily exercised by extraordinarily careful people, is slight negligence. The latter has never been recognized as affecting the rights of parties in this state. *Dreher v. Fitchburg,* 22 Wis. 675; 7 Words & Phrases, 6531.

6. Such of the errors assigned upon the portions of the charge in fact given as are sufficiently argued by appellant to entitle them to attention relate mostly to views of the evidence inconsistent with those entertained by appellant. What we have said as to the evidence on the various subjects discussed will indicate that in the main we approve the court's rather than the counsel's view of the effect of the evidence introduced, and we may dismiss such assignments without further comment. We do not think any of them, except that as to damages, could have had any misleading effect on the jury or have affected the substantial rights of the defendant.

Error is also assigned upon the instruction given with reference to the damages, and refusal of a requested instruction substantially to the effect that the recovery should be by mathematical computation of the present value of an annuity to the amount of the deceased's annual contributions during the probable life of the longest liver of the two parents. It was said in *Rudiger v. C., St. P., M. & O. R. Co.* 101 Wis. 292, 77 N. W. 169, that such computation marked the limit of the pecuniary injury in case of death of a husband by negligence, as contradistinguished from a multiplication of the annual contribution by the number of years' expectancy of life of the

beneficiary. In *Crouse v. C. & N. W. R. Co.* 102 Wis. 196, 208, 78 N. W. 446, 778, which of course should control the earlier case, it was said that mortality tables and annuity tables might be admissible in evidence as an aid in estimating future damages, but that the subject was not one for mathematical computation. Especially is that true where there is no legal right to any specific amount, nor, indeed, to any contribution at all. The court instructed generally in accord with *Crouse v. C. & N. W. R. Co.,* and we do not think any prejudicial error occurred in refusing defendant's request which cannot be fully rectified by requiring a remission of damages.

7. Upon the question of damages, we are convinced that the jury exceeded any amount of pecuniary injury to the parents which might result from the death of their adult son. It is found that his contribution had averaged $250 a year. But it also appears without dispute that during all the time of such contributions he had received from his parents support as an inmate of their family; during most of the time complete support; and during the two years of his railroad service he had retained a room in their house and a home with them and had received his board when not actually out on the road. so it is obvious that his voluntary pecuniary contributions, over and above that which he had purchased by them, could not have exceeded $150 a year. An annuity to the mother, the younger of the two parents, who was fifty-one years old, would have been worth, according to the statutory method of computing the value of life estates (ch. 38, Laws of 1909: sec. 3871*a*, Stats.), approximately ten years' purchase, so that even an annuity of either $150 or $250, payable absolutely and without contingency, could not have been worth nearly the sum of $4,500. The annuity tables are predicated, however, only upon the contingency of life, but this contribution of an adult son to his parents was clouded by many other contingencies. He was under no legal liability

to make any, for the parents are shown not to have been indigent, but in easy circumstances for their apparent station in life. The father, in the prime of health, is shown to have been working regularly and earning $1.50 per day and to own a suitable homestead unincumbered. Any contribution by the son was dependent upon his persistency in habits of industry and of filial devotion as also upon his continued health and ability to contribute. The last might well be impaired in case of his marriage and establishment of a home of his own, a contingency of which the annuity tables or the law can furnish no rule for computation. Thus it is apparent that the present value of the contributions he had been willing to make in the past was by no means equal to the present value of a well secured annuity for the same period. In view of these considerations the court are of opinion that, while the verdict is excessive and therefore erroneous, the plaintiff should be allowed an option to remit therefrom all in excess of $2,500 and take judgment for that. The writer is of the opinion that the amount of such optional judgment should be much less under the rule of *Heimlich v. Tabor,* 123 Wis. 565, 102 N. W. 10.

By the Court.—Judgment reversed, and cause remanded for new trial: with option, however, to plaintiff, at any time within thirty days after notice of filing *remittitur* in the circuit court, to elect to enter judgment for $2,500 damages, with costs: no costs to be allowed in this court for printing case.

The following opinion was filed February 19, 1910:

MARSHALL, J. (*dissenting*). The evidence convinces me that deceased and the engineer were agreed upon the manner of operating the locomotive. True, the latter was the superior. True, if the former had protested he would have been powerless in the matter. But likewise true, if deceased

approved of the venture and aided the engineer in a spirit of co-operation instead of mere subordination, the negligence was that of both and it would be a wrong to make the employer repair the loss to surviving relatives which they jointly inflicted. To my mind the evidence shows, conclusively, that the two employees concurred in the negligent act. The danger was just as apparent to one as to the other. The deceased manifested no fear and no disapproval. On the contrary, he entered into the spirit of the thing, showing the most complete mental as well as physical co-operation.

The infirmity in this case is not in that the fireman failed to do something to deter the engineer from pursuing his obviously reckless course, but in that the evidence clearly shows he was perfectly agreeable to what was done, and, therefore, appellant should not be required to pay his personal representative on account of his negligence.

FIRST NATIONAL BANK OF OMRO, Respondent, vs. BEAN, imp., Appellant.

January 12—February 1, 1910.

Principal and agent: Power of attorney: Construction: Authority to make and indorse notes: Bona fide *purchasers: Guaranty: Consideration: Payments: Ratification.*

1. Authority to make or indorse promissory notes, given in a power of attorney to "take the general control and management of the" principal's "affairs, business, and property" and to "do every act, matter, or thing which the nature of such business shall require," is limited to such notes only as are necessarily connected with the conduct and management of the business.
2. Where such a power of attorney is duly recorded, and the agent sells to a bank the note of a third person, appearing in no way to be connected with the business, property, or affairs of his principal, on which the principal's name purports to be personally indorsed, and deposits the proceeds of the note in the bank to his personal account, and later, purporting to act under the

power of attorney, signs his principal's name to a guaranty of the note, the officers of the bank are not justified in accepting the note or the guaranty as authorized by the power of attorney.

3. The contract of guaranty in such case, made apparently as an independent undertaking long after the making and negotiation of the note and prior to its maturity, and wholly without consideration as to the principal, is of no effect.

4. Payments by an agent on a note collateral to a prior note purporting to be indorsed by his principal is not a ratification of such indorsement, where neither the agent nor the principal had any knowledge of the existence of such prior note.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

On May 31, 1899, *Julia M. Bean* executed a power of attorney to Herbert L. Sweet, the essential parts of which are as follows:

"For me and in my name, place and stead, to take the general control and management of my affairs, business and property; to buy, sell, pledge, mortgage, execute and enter into bonds, contracts, conveyances and incumbrances in behalf of the same, and in general to do and perform all other acts and things which he may consider useful and necessary, connected with my said affairs, business, property and interests; to manage and transact all business, open all letters of correspondence, and to answer the same; to draw, accept, make, indorse and pay all bills of exchange and promissory notes; to receive and receipt for all moneys; to draw and sign all orders, checks and drafts for moneys on the cashier of the German National Bank, or any other bankers or persons where I shall deposit or keep money; to arrange, balance, and settle all books and accounts, and generally do every act, matter or thing which the nature of said business shall require; giving and granting hereby unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about said premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying all that my said attorney, or his substitute, shall lawfully do or cause to be done by virtue hereof."

This power of attorney was recorded June 12, 1899. In

1901, while the power of attorney was in force, Herbert L. Sweet presented the following note to the plaintiff bank:

"$900.00. Oshkosh, Wis., November 6th, 1901.

"Four months after date, for value received, we promise to pay to W. P. Wheeler, cash, or order, at the *First National Bank of Omro,* nine hundred dollars, with interest to be paid at the rate of six per cent. per annum, until paid.

"THE WINNEBAGO COUNTY AG'L & HORT'L ASS'N.

"John Athearn, Pres. Herbert L. Sweet, Secretary.

"Due Mar. 6, '02."

On the back of the note were the following indorsements: "Herbert L. Sweet, *Julia M. Bean,* John Athearn, Helen M. Sweet." Helen M. Sweet was the wife of Herbert L. Sweet. The association never authorized the making of the note, nor did any of the persons whose names were signed to it or indorsed upon it, except Herbert L. Sweet, know that the note was made. Herbert L. Sweet claims that the association was indebted to him for money advanced to pay debts of the association. The $900 received from the bank on the note was deposited to the credit of Herbert L. Sweet and was checked out by him in his own affairs. No one else received any consideration for the note or any of its proceeds. In January, 1902, *Mrs. Bean* selected A. J. Barber to take charge and control of her affairs. After the note was purchased by the bank additional security was demanded, and on February 24, 1902, Herbert L. Sweet made the following indorsement upon the note:

"For value received, we, or either of us, hereby guarantee the payment of the within note at maturity and waive protest, notice of protest and all defense on account of the extension of time of judgment by the holder or holders hereof.

"Dated this 24th day of Feb'y, 1902.

"HERBERT L. SWEET.
"JULIA M. BEAN.
"HELEN M. SWEET.
"By H. L. SWEET.
"Their Attorney in Fact."

On February 26, 1902, H. L. Sweet, as attorney for *Mrs. Bean,* executed a note for $900 and a mortgage upon real estate belonging to *Mrs. Bean* as additional security for the first note. On March 6, 1902, the date when the first note became due, Herbert L. Sweet gave his individual note for $900, due in two months. The note contains the following notation: "Collateral on dep. and fair note attached." A revocation of Herbert L. Sweet's power of attorney was executed by *Mrs. Bean* on May 6, 1902, and was recorded on the same day. On May 10, 1902, A. J. Barber, who had charge of *Mrs. Bean's* affairs, sent $100 to the plaintiff as a partial release of the mortgage executed February 26, 1902, and directed that it should be credited on the note. This and other subsequent payments were credited by the bank on the first note. Neither A. J. Barber nor *Mrs. Bean* knew of the existence of the first note until the commencement of this suit, which is on the first note.

The court refused to admit evidence tending to show that during January, 1902, the officials of the bank knew that *Mrs. Bean's* business affairs were no longer being handled by Herbert L. Sweet, but were in charge of A. J. Barber.

This is an appeal from the judgment on the verdict directed by the court against Herbert L. Sweet and *Julia M. Bean.*

For the appellant there was a brief by *Hume & Oellerich,* and oral argument by *R. L. Clark.*

For the respondent there was a brief by *Barbers & Beglinger,* and oral argument by *Fred Beglinger.*

SIEBECKER, J. The trial court adjudged that *Mrs. Bean* was liable because the acts of Herbert L. Sweet were within the authority conferred by the power of attorney. *Mrs. Bean* by the power of attorney grants Herbert L. Sweet power "to take the general control and management of [her] affairs, business and property," to perform all acts connected therewith, including the execution, indorsing, and paying of promissory notes, the receipting for and paying of money, and

"generally [to] do every act, matter or thing which the nature of said business shall require." The powers thus conferred are clearly defined by the context of the writing and confer authority to control and manage her affairs as her business and property may require. The authority to execute, indorse, and pay promissory notes is restricted to the scope of the general power conferred to do all acts required for the control and management of her affairs, business, and property. This power to execute and indorse notes should therefore not be extended to include authority to execute promissory notes for purposes not embraced within the execution of the powers conferred. The terms of the power include the authority to indorse only such promissory notes as are necessarily connected with the execution of these powers, and apply only to promissory notes which her business necessities demanded. The inquiries therefore are: Was the note in question made and executed to carry out the power conferred on Sweet for the control and management of *Mrs. Bean's* affairs, business, and property? and Had the bank officers, under the facts and circumstances of the negotiation of the note, the right to accept it as a note pertaining to the management of *Mrs. Bean's* affairs and as executed under the power of attorney? There is no dispute but that Herbert L. Sweet made and executed the note, and it clearly appears that it was not in fact connected with the management and control of *Mrs. Bean's* affairs, business, and property. The evidence relevant to this question permits of but the one inference that this note had in fact no connection with the administration of *Mrs. Bean's* property and business affairs.

It is averred by the respondent that the bank officers were not apprised of this fact when they negotiated for the note, and that they therefore had a right to assume that it was made and executed by Herbert L. Sweet under the power of attorney, and that it was necessarily connected with the affairs and business intrusted to his control and management. This

claim is negatived by the facts. The power of attorney was properly recorded. This afforded a convenient opportunity for the officers of the bank to ascertain the extent of the powers actually conferred by the power of attorney. In the light of the facts of the transaction with the bank it cannot be said that the officers were warranted in concluding that the note was given by Herbert L. Sweet as attorney in fact for *Mrs. Bean.* The face of the note shows that it was the note of the Winnebago County Agricultural & Horticultural Association. It purported to be executed by its president and secretary and to be personally indorsed by the president and secretary and by Mrs. Sweet and *Mrs. Bean.* The note and the indorsements bear no evidence that the note was connected with the affairs, business, and property of *Mrs. Bean.* Nor did it then bear any evidence that it had been executed by Herbert L. Sweet as attorney in fact. Herbert L. Sweet deposited the proceeds of the note with the bank to the credit of his personal account. Obviously this must have been known to the bank, and it accords with and corroborates the idea that the bank was apprised of the fact that Herbert L. Sweet had obtained the money on the note for his own use and benefit. Taking these facts in connection with the restriction in the power of attorney, by which he was limited as such attorney in fact to the giving of such notes as were required for the conduct and management of *Mrs. Bean's* business affairs and property, and it clearly follows that the plaintiff has failed to show any grounds which justified it in accepting the note in question as one authorized by the power of attorney.

From these facts and circumstances it also follows that the alleged guaranty of February 24, 1902, was not binding upon *Mrs. Bean,* though it is in form executed by Herbert L. Sweet as such attorney in fact. The bank was then informed that the note was not embraced within the authority of Herbert L. Sweet and that he was powerless to impose such a liability upon his principal in this manner. Furthermore, this con-

tract of guaranty is an apparently independent undertaking of a date long subsequent to the making and negotiation of the note and before its maturity. It is wholly without consideration as to *Mrs. Bean,* and the alleged guaranty is therefore of no effect.

In view of the fact that the powers of Herbert L. Sweet to make notes for *Mrs. Bean* were limited and restricted to cases where they were necessarily required for the conduct and management of her affairs, business, and property, and in view of the facts and circumstances established by the evidence, the case does not show that the note in question was one within the authority conferred on Herbert L. Sweet or that the bank had the right to deem it to be such a note.

It is contended that the payments made by A. J. Barber as *Mrs. Bean's* agent on the collateral note of February 26, 1902, are a ratification of the obligation of the original note. When these payments were made, neither *Mrs. Bean* nor Mr. Barber had any knowledge of the alleged original obligation. To make the acts of Mr. Barber efficacious as a ratification it must appear that he had authority to act in the matter for *Mrs. Bean* and that both he and *Mrs. Bean* had knowledge of the material facts. The record shows that neither *Mrs. Bean* nor Mr. Barber knew that the note upon which the suit is brought was in existence. This in itself is conclusive that he did not ratify it.

We are persuaded that the trial court erred in holding *Mrs. Bean* liable on the note.

By the Court.—Judgment reversed as to *Julia M. Bean,* and the cause remanded with directions to award judgment dismissing the complaint as to *Julia M. Bean.*

SMITH, Respondent, vs. REED, Appellant.

January 12—February 1, 1910.

(1, 4) *Appeal: Review: Questions of fact.* (2, 3) *Sales: Warranty: False representations: Reliance of vendee thereon: Burden of proof.*

1. Refusal of the trial court to change the jury's answer to a question in a special verdict will not be held error if there was any credible evidence to support such answer.
2. The evidence in this case is *held* sufficient to sustain a finding by the jury that the buyer of a horse did not rely upon the seller's representations as to its soundness.
3. For breach of an express warranty, given in express terms as a part of a contract of sale, the vendee may recover without proving that he relied thereon; but where a mere representation of a fact is proved, it must be shown to have been relied upon by the vendee in order to constitute a warranty.
4. Where, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), a controverted matter of fact not submitted to the jury in the special verdict is deemed to have been determined by the trial court in conformity with its judgment, such determination will not be disturbed if the evidence is conflicting.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was brought to recover on a check given by defendant to plaintiff as the purchase price of a horse. The defense was breach of warranty. The answer admitted the giving of the check and nonpayment thereof and denied that there was anything due on the check, and further answered that plaintiff warranted the horse to be sound and free from disease and that defendant relied upon such warranty and representation, and that the purchase of the horse upon the warranty and representations was the only consideration for the check, and further alleges breach of the warranty, and sets up a counterclaim for the recovery of expenses incurred in endeavoring to cure the horse.

The jury returned the following verdict:

"(1) Did the plaintiff say to the defendant, before the purchase of the horse, that the horse was all right and sound? *A.* Yes.

"(2) Did the plaintiff say to Henry before the purchase, in the presence and hearing of the defendant, that he would guarantee that the horse was all right? *A.* No.

"(3) If you answer either the first or second question 'Yes,' then did the defendant in making such purchase rely upon such representation? *A.* No.

"(4) Was the horse diseased at the time the defendant purchased her? *A.* Yes.

"(5) If you answer the last question 'Yes,' then was such disease the cause of the death of the horse? *A.* Yes.

"(6) What were the reasonable expenses for the medical treatment of said horse incurred by the defendant? Answered by the court (by consent). $15."

The defendant moved that the answer to the third question be changed from "No" to "Yes," also for judgment on the verdict and for a new trial, which motions were denied and due exceptions taken. The plaintiff moved for judgment on the verdict, which was granted for the sum of $140 damages and interest. The defendant moved that the judgment so entered be corrected by deducting therefrom the sum of $15 damages, money expended in endeavoring to cure the horse, which motion was denied and due exception taken. Judgment was entered for $140, interest, and costs, amounting in all to the sum of $221.68, from which judgment this appeal was taken.

For the appellant there was a brief by *Barbers & Beglinger*, and oral argument by *Fred Beglinger*.

For the respondent there was a brief by *Weed & Hollister*, and oral argument by *R. A. Hollister*.

KERWIN, J. 1. It is insisted that there is not sufficient evidence to support the answer to the third question, and therefore the answer should have been changed from "No" to "Yes" in accordance with the defendant's motion, and judgment given for the defendant. A very strong argument is made by counsel for defendant to the effect that the evidence shows conclusively that the defendant did rely upon the repre-

sentations to the effect that the horse was sound and all right, and that the law applicable to the facts as established authorized a verdict for the defendant. After a careful reading of the evidence we are forced to the conclusion that the question was properly for the jury. It is true that a strong case was made tending to show that the defendant relied upon the representations to the effect that the horse was sound. The defendant testified that he relied upon them, and produced many other evidentiary facts in support of his positive evidence. But it is also true that he had the horse examined by two parties of his own choosing before he purchased; and while it appears that such examinations were not thorough and probably not sufficient to discover the unsoundness, if it could have been discovered, it cannot be said as matter of law that the defendant did not rely upon them. The defendant drove the horse before purchase, exhibited it to one Laabs, in whose opinion he had confidence, and also to a veterinary surgeon, and besides had his employee ride with plaintiff after the horse and observe its movements. It also appears from the evidence that the defendant knew that the horse appeared sluggish and called the plaintiff's attention to the fact, and was informed that this was occasioned by overwork, and that such statement misled defendant. But it does not appear that the plaintiff had knowledge of the unsoundness or that he did not believe that the work caused the sluggish disposition. It does appear that the horse had been worked considerably at farm work shortly before the sale. The defendant testified that he had a veterinary, Dr. Barnes, examine the horse because he did not rely upon his own judgment, and was satisfied with the veterinary's opinion as far as it went. Barnes called defendant's attention to the fact that the horse looked lazy and logy, but said that was characteristic of that breed of horses. Defendant also testified that he had Laabs examine the horse because he considered him a competent judge of horses and would rely upon his judgment. The foregoing

gives an idea of the character of the evidence, which we think was sufficient to sustain the finding of the jury in answering the third question as they did, and, as we have often said, deference is due to the judgment of the trial judge in sustaining the finding of the jury. *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57, and cases cited. This court has repeatedly said that where there is any credible evidence to support the verdict of a jury it cannot be disturbed. The rule has been thus stated by this court:

"The rule of this court is absolutely settled that if there is any credible evidence which to a reasonable mind can support an inference in favor of a party, the question is for the jury, and the court cannot assume to answer it, either upon motion for nonsuit or direction of verdict, or by substituting other answers after the verdict is returned." *Beyer v. St. Paul F. & M. Ins. Co., supra; Milwaukee R. M. Co. v. Hamacek,* 115 Wis. 422, 91 N. W. 1010; *Southern D. Co. v. Silva,* 125 U. S. 247, 8 Sup. Ct. 881.

We are therefore unable to say that error was committed in refusing to change the answer to the third question of the special verdict.

2. The appellant also assigns error upon the charge. The court charged the jury:

"A person who sets up the defense of warranty, as in this case, must establish by greater weight of evidence that the defendant relied upon that warranty in making the purchase, and, if he has failed to do so, you must answer the third question 'No.'"

The defendant set up an affirmative defense, namely, the representation by plaintiff that the horse was sound, and reliance upon such representation by defendant. The burden of proof was upon the defendant to establish this defense. The representation did not amount to a warranty unless relied upon by defendant. Jones, Ev. (2d ed.) § 190 (190); *Milwaukee R. M. Co. v. Hamacek,* 115 Wis. 422, 91 N. W. 1010; *Klipstein v. Raschein,* 117 Wis. 248, 94 N. W. 63; *Richard-*

son v. Coffman, 87 Iowa, 121, 54 N. W. 356; *Hahn v. Doolittle,* 18 Wis. 196; *Smith v. Justice,* 13 Wis. 600; *Austin v. Nickerson,* 21 Wis. 542; *Bergeler v. Michael,* 84 Wis. 627, 54 N. W. 995. The burden to establish reliance upon the representation and thus prove a warranty was upon the defendant under the repeated decisions of this and other courts; therefore the instruction was a correct statement of the law as applied to the evidence in the case. It is true that if an express warranty had been given in express terms as a part of the contract of sale, no proof of reliance thereon would have been necessary. *Shordan v. Kyler,* 87 Ind. 38; *Harrington v. Smith,* 138 Mass. 92; *Nauman v. Ullman,* 102 Wis. 92, 78 N. W. 159. But where a mere representation of fact is proved, as in the case before us, it must be shown to have been relied upon by the vendee in order to constitute a warranty. *Hoffman v. Dixon,* 105 Wis. 315, 81 N. W. 491.

3. Further error is assigned on the refusal of the court to deduct from the judgment the $15 expense incurred in endeavoring to cure the horse, on the ground that the plaintiff agreed to pay it. The testimony, however, on this point is conflicting; and, since there was no finding of the jury upon it, it must be deemed to have been determined by the court in favor of respondent and cannot be disturbed. Sec. 2858*m,* Stats. (Laws of 1907, ch. 346). There may be other grounds upon which the item should have been resolved against the defendant, but we need not consider them, since the question of fact as to whether or not plaintiff agreed to pay such expense must be deemed determined against defendant on sufficient evidence. It follows that the judgment of the court below must be affirmed.

By the Court.—The judgment of the court below is affirmed.

LEITERMANN, Respondent, vs. BARNARD, Appellant.

January 12—February 1, 1910.

Sales: On approval: Qualified acceptance: Breach of warranty: Set-off: Damages.

1. Where plaintiff contracted to install a gas lighting plant in defendant's building and, if it did not satisfactorily light the building, to remove it and to pay any damages caused by the installation, but upon the plant proving unsatisfactory defendant refused to permit its removal unless plaintiff would give security for the repair of the damage, such refusal amounted to an acceptance of the plant, with reservation of the right to recoup damages for its failure to satisfy the warranty.
2. In an action for the contract price in such case defendant might set off his damages upon proof of the difference between the real value of the lighting plant and its value had it conformed to the warranty, but cannot set off damages to the building, for which he would be entitled to recover only upon removal of the plant.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The appeal is from a judgment adjudging the plaintiff was entitled to a mechanic's lien on defendant's premises, foreclosing the lien and ordering sale of said premises to pay this lien, for $122.60 damages, and $94.38 costs.

The cause was submitted for the appellant on the briefs of *James Kirwan,* and for the respondent on that of *J. E. McMullen.*

Among references cited upon the part of the appellant were the following: *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 97 N. W. 515; *Widman v. Gay,* 104 Wis. 277, 80 N. W. 450; *Fuller-Warren Co. v. Shurts,* 95 Wis. 606, 70 N. W. 683; *Williams v. Thrall,* 101 Wis. 337, 76 N. W. 599; *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356; *Houlahan v. Clark,* 110 Wis. 43, 85 N. W. 676; *Manthey v. Stock,* 133 Wis. 107, 113 N. W. 443; *Froelich v. Christie,* 115 Wis. 549, 92 N. W. 241; *Charley v. Potthoff,* 118 Wis. 258, 95 N.

W. 124; *Phœnix Mfg. Co. v. McCormick H. M. Co.* 111 Wis. 570, 87 N. W. 458; *Keefe v. Furlong,* 96 Wis. 219, 70 N. W. 1110; *Weeks v. Robert A. Johnson Co.* 116 Wis. 105, 92 N. W. 794; *American F. & F. Co. v. Board of Ed.* 131 Wis. 220, 110 N. W. 403; *J. H. Silkman L. Co. v. Hunholz,* 132 Wis. 610, 112 N. W. 1081.

Among other references upon the part of the respondent were the following: *Cooper v. Cleghorn,* 50 Wis. 113, 6 N. W. 491; *Gunderson v. Swarthout,* 104 Wis. 186, 80 N. W. 465; *Baringer v. Evenson,* 127 Wis. 36, 106 N. W. 801; *E. M. Fish Co. v. Young,* 127 Wis. 149, 106 N. W. 795; *Rinzel v. Stumpf,* 116 Wis. 287, 93 N. W. 36; *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 81 N. W. 136; *Zipp Mfg. Co. v. Pastorino,* 120 Wis. 176, 97 N. W. 904; *Van Trott v. Wiese,* 36 Wis. 439; *Friend Bros. C. Co. v. Hulbert,* 98 Wis. 183, 73 N. W. 784; *Palmer v. Banfield,* 86 Wis. 441, 56 N. W. 1090; *Kingman & Co. v. Watson,* 97 Wis. 596, 73 N. W. 438; *Fox v. Wilkinson,* 133 Wis. 337, 113 N. W. 669; *Rohrer v. Lockery,* 136 Wis. 532, 117 N. W. 1060.

TIMLIN, J. The trial court found upon sufficient evidence that the plaintiff agreed to install a gasoline gas lighting plant in the saloon and dwelling house of defendant, situate upon certain described land, and that said plant would properly and satisfactorily light said building; if it did not, the plaintiff would remove said lighting plant from the building and pay any damages that he might have caused by setting up and installing the lighting plant. The lighting plant did not properly or satisfactorily light the defendant's premises, and plaintiff attempted to remove the same as provided by the contract, whereupon defendant refused to permit its removal unless plaintiff would give security or make a deposit of $50 to repair any damages caused by the installing of said lighting plant. The plaintiff refused to give security or make this deposit, whereupon defendant forbade the removal of said

plant and forcibly prevented its removal. This action to foreclose a mechanic's lien was then commenced. The circuit judge treated the defendant's refusal to permit the removal of said plant, except upon conditions which he had no right to impose, as an acceptance of the plant, and rendered judgment for the full contract price. This was correct. The defendant offered no proof of the diminished money value of the plant, and indeed no proof of any damages whatever except the sum of $15 damage to the buildings caused by making apertures for the reception of pipes or fixtures, and which would have been a proper item of damages only if the plant had been removed.

We may entirely agree with the appellant that there was an entire contract in the sense that part performance would not entitle the plaintiff to recover. But the law relating to acceptance applies to such a contract. Here there was what was equivalent to an acceptance of the plant, with a reservation of defendant's right to recoup damages had he seen fit to prove such damages. There may be such qualified acceptance; that is to say, acceptance as a purchase, but not acceptance as satisfying a warranty. *Fox v. Wilkinson,* 133 Wis. 337, 113 N. W. 669. In this respect the instant case differs from *Kingman & Co. v. Watson,* 97 Wis. 596, 73 N. W. 438, where the contract provided what should be the effect of acceptance and retention of the property. This made the ressult of acceptance in the case last cited a question of law, while in cases like the instant case the scope of the acceptance would ordinarily be a question of fact. *Park v. Richardson & B. Co.* 81 Wis. 399, 51 N. W. 572. Notwithstanding the form of agreement here, the defendant was at liberty to make such qualified acceptance, and afterward set off his damages against the purchase price, had he shown the difference between the real value of the lighting plant and its value had it conformed to the warranty. *Park v. Richardson & B. Co., supra.* Having offered no evidence on this point, there can be no reduction

from the contract price, because the $15 damage to the building is the measure of damages only in case the plant had been removed, not in case of its retention.

By the Court.—Judgment affirmed.

KISTLER, Respondent, vs. KISTLER, Appellant.

January 12—February 1, 1910.

Divorce: Judgment: Division of property: Remarriage of parties: Second action: Agreement in aid of divorce: Satisfaction of prior judgment.

1. A judgment in a divorce action awarding a certain sum as and for "permanent alimony and division of property" must be construed as making a final division of the property, not open to change after the term at which it was rendered.
2. Such a judgment becomes the separate property of the wife and is not affected by remarriage of the parties to each other.
3. A stipulation between the parties to a divorce action, reciting their agreement to separate and providing that the wife should prosecute the action and should accept a certain sum as alimony and should not demand any further sum, was void as being an agreement in aid of divorce.
4. Payment of the sum mentioned in accordance with such void stipulation did not operate to satisfy the judgment in a prior divorce action between the same parties, in which the wife was awarded a certain sum as a final division of property.

MARSHALL, J., dissents.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The defendant petitioned for an order satisfying a judgment obtained against him by the plaintiff, and appeals from an order denying his petition.

The facts were that the parties were husband and wife, and that on August 30, 1898, the plaintiff obtained judgment of divorce against the defendant, wherein it was adjudged that

the defendant pay to the plaintiff $1,000 "as and for her permanent alimony and division of property;" that the parties remarried September 28, 1898, and lived together for some months; that the plaintiff commenced another divorce action early in the year 1901; and that the parties entered into a stipulation at or just prior to the commencement of this second action reciting their agreement to separate, and proceeding as follows:

"And said *Josephine M. Kistler* having agreed and by these presents agreeing to prosecute the suit for divorce which has been commenced, and agrees to accept the sum of three hundred dollars as alimony, and further agrees to not ask for or demand any further sum or sums whatever. One hundred and fifty dollars to be paid down at the ensealing of these presents and the other one hundred and fifty dollars on or before February 22, 1901."

This $300 was paid and another judgment of divorce was taken by default June 11, 1901, without any provision as to alimony. The original judgment of $1,000 in the first action was never in fact paid, but the defendant's contention is that the $300 paid pursuant to the stipulation in the second action was in fact paid in settlement not only of all claim for alimony in that action, but in settlement of the judgment for division of property in the first action.

For the appellant there was a brief by *Kopp & Brunckhorst,* and oral argument by *L. A. Brunckhorst.*

R. A. Watkins, for the respondent.

WINSLOW, C. J. There are two questions in the case: *First.* What was the effect of the remarriage on the judgment for division of property in the first divorce action? *Second.* Was that judgment paid and satisfied by the stipulation made in the second action and the payment of the $300 thereunder?

1. The judgment for $1,000 in the first action is confused and inaccurate because it describes that sum as and for "permanent alimony and division of property," whereas it cannot

be both. It must, however, be construed as a division of property. *Von Trott v. Von Trott,* 118 Wis. 29, 94 N. W. 798. So construing it, the result necessarily follows that it was a final adjudication, not open to revision after the term at which it was rendered, and became the separate estate of the plaintiff. Being her separate estate, it continued to be such after her remarriage to the defendant, and was manifestly unaffected thereby. Sec. 2341, Stats. (1898). Had it been a judgment for alimony proper, *i. e.* support payable periodically, remarriage of the wife, even to a third person, would probably justify the court in reducing or taking away the provision entirely. 2 Bishop, Mar., Div. & Sep. § 1058; 14 Cyc. 787, and cases cited in note 24. But, as we have seen, a judgment for division of the property is final, conclusive, and not open to change after the term at which it is rendered.

2. The judgment not being affected by the remarriage, was it satisfied by the stipulation? This question must on principle be answered in the negative. This court has said, in accordance with the prevailing rule of law, that "agreements promotive of marriage are valid, and those in aid of separation and divorce are void." *Baum v. Baum,* 109 Wis. 47, 85 N. W. 122; *Oppenheimer v. Collins,* 115 Wis. 283, 91 N. W. 690. The stipulation in question was an agreement in aid of divorce. The expressed consideration for the agreement to pay the $300 was the agreement by plaintiff to prosecute an action for divorce. While there is no direct agreement on defendant's part to abstain from defending the divorce action, it is very evident that the object and purpose of the agreement was that plaintiff should diligently prosecute her suit for divorce and receive from defendant $300 for so doing. This must be considered an agreement having for its object the facilitating of the procurement of a divorce and hence void. 15 Am. & Eng. Ency. of Law (2d ed.) 956. If the agreement to pay the $300 was void, the agreement by plaintiff that

such sum should be accepted in satisfaction of all claims for alimony is necessarily void, because they are both parts of the same transaction and so woven together as to be inseparable.

By the Court.—Order affirmed.

MARSHALL, J. (*dissenting*). Irrespective of whether the agreement was of a character rendering it void because promotive of separation between man and wife, I cannot concur in the result.

Without expressly dissenting from the conclusion that the agreement should be classed as pernicious, it seems there is good reason for holding the real intention of the parties to have been to deal with their property matters in view of a pending controversy in which a judicial separation was inevitable. Actual separation had already taken place. An action for divorce was pending. The defendant, evidently realizing that he had no defense, and that his wife had and would prove a cause of action, attempted to make and was successful in making an amicable settlement as to property. That the parties did not intend anything more, is evidenced from the fact that the trial court so considered the matter and disposed of the case, in all respects disregardful of the agreement as to the separation.

There is an elementary rule that if, looking at the language of a contract or its effects and consequences, in view of all the circumstances under which it was made, it will reasonably admit of a construction rendering it valid, that should be adopted rather than one which will render it void. Such rule is particularly applicable when the latter construction would result in holding the parties to the contract up to infamy, as having violated the moral or written or unwritten law. It has been applied in such a case as this. *Paul v. Paul,* 71 Ill. App. 671.

In that case in the terms of the settlement was one that the appellee should file a bill for a divorce from her husband,

which he would not defend, and that upon the bill a decree should be entered against him, with a gross sum for alimony. Yet from other portions of the agreement and all the circumstances, the court reached the conclusion that the entire contract would reasonably admit of a construction that the part on the subject of alimony was independent of the subsequent divorce, and so adopted it, considering, under all the circumstances, that any other result would be so inequitable that no court would allow it if it could be avoided.

If the contract was really one for or to promote a divorce, it was a fraud on the court and might result in most disastrous consequences to the parties who have relied on the judgment of separation as valid. If the court had supposed it was such a contract, it would have doubtless ended the proceedings by dismissing plaintiff's complaint. In this proceeding the trial court did not pass upon that matter, but decided the case upon the question of fact as to whether the parties, by the contract, intended to settle the former money judgment. Mere contracts for the division of property, in contemplation of a divorce, entered into before the commencement of the action, or pending it, are valid. 1 Nelson, Divorce & Sep. § 509.

This case seems unlike *Baum v. Baum,* 109 Wis. 47, 85 N. W. 122, where there was an agreement entered into for a separation more in contemplation of preventing a divorce than otherwise, and unlike *Oppenheimer v. Collins,* 115 Wis. 283, 91 N. W. 690, where there was an agreement upon a consideration to withdraw an action for a divorce and continue marital relations.

We should confess, in passing, that the contract was carelessly drawn, in that it contained some language appropriate to an agreement to promote obtaining a divorce, and so did the contract pursuant to which the allowance of $1,000 was made in the first action. There the parties, in terms, stipulated for a "judgment for a divorce on her complaint as demanded without further notice." But the court seems, in view of the

whole contract and under all the circumstances, to have construed the paper as only dealing with the property matter, and the case proceeded accordingly, no attention being paid to the stipulation for judgment.

On the question of fact as to whether the former judgment was settled in the last transaction, it being included by mutual intention, as it was in this appropriate language: "To accept the sum of three hundred dollars as alimony, and further agrees to not ask for or to demand any further sum or sums whatever," the question on which the judgment turned in the court below, this court has not expressed an opinion. That the parties intended to cover everything seems to be conclusively shown by their own practical construction of their agreement. Full payment was made under the second agreement and for seven years thereafter respondent made no claim under the first judgment in question, though it is as certain as anything can well be that she would have made such claim had she not supposed such judgment was settled. After the lapse of many years and the matter being called to her attention, she said she supposed the judgment was settled in the second transaction, and all her subsequent conduct corroborates that. Furthermore, evidence of what occurred when the second contract was made, seems to leave no reasonable doubt about the matter.

If I am wrong in the foregoing, in that there is some doubt, it seems that, since the respondent received the $300, appellant thinking, as he must, that respondent regarded the payment as ending his personal relations with her in every way, and she having given no indication but that she so considered it for many years, she should be held to have acquiesced in appellant's view, if not to be estopped from claiming to the contrary, either of which, acquiescence or estoppel, would be sufficient to entitle appellant to have the cloud upon the title to his land, created by the judgment, removed. I think appellant should prevail.

QUINN, Administratrix, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

January 12—February 1, 1910.

Death: Right of action, when arises: Survival: Statute enacted after injury: Construction: Retroaction: Constitutional law.

1. A law giving, under specified circumstances, a right of action for damages to particular surviving relatives of a person when his death has been caused by actionable negligence of another, does not apply to wrongs antedating the law though death resulted therefrom subsequently.
2. Though there may different rights of action for damages arise from the injury and death of a person through actionable negligence of another, each springs from a remedial right, as distinguished from a violation of it, existing at the time of the wrongful act.
3. The right of action accruing in favor of surviving relatives of a person upon his death being caused by actionable negligence of another, is not one which survives since it does not exist till death occurs.
4. Though the right of action arising in favor of surviving relatives of a person upon his death being caused by actionable negligence of another comes into existence when death occurs, it has an inchoate existence as soon as the negligent act produces the injury.
5. A statute which is not by its terms retroactive but is ambiguous, is to be strictly construed in favor of nonretroactive character.
6. Though the legislature may provide new remedies for past wrongs it cannot create new obligations therefor.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The claim of the plaintiff was that on the 25th day of June, 1907, Stephen Quinn was injured by actionable negligence of the defendant. He commenced an action to recover compensation therefor. Pending the action, he died by reason of his injuries, leaving no lineal descendants or ancestors, but leaving two sisters. The action was revived in favor of his personal representative and a supplemental complaint served con-

taining the old cause of action and a second supposed cause for recoverable damages for the benefit of the sisters.

Subsequent to the injury and prior to the death, by ch. 164, Laws of 1907, it was provided that in case of the decease of a person from the wrongful act of another in such circumstances that if death had not ensued the injured person might have maintained an action to recover damages in respect thereto, the wrongdoer should be liable to an action for damages, notwithstanding the death, in favor of surviving brothers and sisters, in case of there being any and there being no husband or widow or lineal descendant or ancestor to claim damages. Prior to such law collateral relations had no such right of action. The defendant demurred to the new cause of action for insufficiency, and the demurrer was sustained.

The cause was submitted for the appellant on the brief of *Fiedler & Fiedler,* and for the respondent on that of *Spensley, McIlhon & Priestly,* attorneys, and *Chas. E. Vroman,* of counsel.

MARSHALL, J. Appellant submits for decision this proposition: Does a law passed subsequent to the injury of a person and before his death resulting therefrom; the injury having been caused by negligence of another under such circumstances that had such person lived he could have recovered of such other compensation for his injury; creating a right of action for damages sustained by particular surviving relatives, apply to them?

As indicated by the statement, when plaintiff's intestate was injured, by the statutes of this state (secs. 4255, 4256, Stats. 1898) an action accrued to him to recover damages in respect thereof, and, contingent upon his death ensuing from such injury leaving no widow, a right of action accrued in favor of his personal representative for the benefit of his lineal descendants, in case of there being any, otherwise in favor of his lineal ancestors, in case of there being any, for the

damages suffered to them by reason of the wrong. No right of action, in any event, existed in favor of collateral relatives. After commission of the wrong, by ch. 164, Laws of 1907, sec. 4256 was amended adding a third class of beneficiaries, viz.: brothers and sisters, in case of a death caused by such an injury under the circumstances named. It will be observed that the right of action in such a case as this is dependent upon, first, death of a person caused by actionable negligence of a legally responsible party, second, survival of relatives mentioned in the statute who had a pecuniary interest in the continuance of the life. Hence, without the particular survivor, or survivors, mentioned in the statute there is no right of action for damages other than the one in favor of the person injured. *Woodward v. C. & N. W. R. Co.* 23 Wis. 400; *Regan v. C., M. & St. P. R. Co.* 51 Wis. 599, 8 N. W. 292; *Gores v. Graff,* 77 Wis. 174, 46 N. W. 48; *Topping v. St. Laurence,* 86 Wis. 526, 57 N. W. 365; *Schmidt v. Menasha W. Co.* 99 Wis. 300, 74 N. W. 797; *Brown v. C. & N. W. R. Co.* 102 Wis. 137, 77 N. W. 748, 78 N. W. 771.

The right of action for the benefit of survivors, though sometimes spoken of as one which survives, is really not that, because it does not come into existence till the death of the injured person occurs. *Topping v. St. Lawrence, supra; Brown v. C. & N. W. R. Co., supra.* However, the right, inchoate in character as distinguished from the right of action, comes into existence and becomes fixed as soon as the injury occurs, but the right of action waits upon death occurring.

Counsel for appellant, in this case, failed to discover that the terms, "new right or cause of action" and "new right," used particularly in *Brown v. C. & N. W. R. Co., supra,* were treated as synonymous, going no further than the term "right of action" used in previous decisions, and not as suggesting a right the violation of which creates a right or cause of action. The latter depends upon the former. Without the one there cannot be the other. That one relates to and springs into

existence at the time of commission of the wrong, and is not violated so as to create the cause of action till that wrong results in death. It is said in the *Brown Case* that the wrong is single. From it there may spring two complete violations of rights, making two distinct causes of action. The one becomes vested the instant the injury happens, the other is in suspense till death occurs.

It must follow from the very logic of *Brown v. C. & N. W. R. Co.*, upon which the learned counsel depend, that all rights of action for the death of a person, as in this case, must depend upon the status as regards the law at the time of the injury, for it is then that the remedial right, as against the wrongdoer, must exist and its violation commence, in contemplation of the statute, in order that the final event terminating the possibility of pecuniary benefits accruing to the statutory beneficiary by a continuance of the life may constitute a remediable wrong.

The result is that the law of 1907, passed subsequent to the wrong, adding collateral relations to the class of persons for whose benefit such an action as this may be brought, did not give such persons a right of action, because not having a remedial right at the time of the injury which could then form the basis of a right of action contingent upon the death of the injured party.

It seems that the logic of *Keeley v. Great N. R. Co.* 139 Wis. 448, 121 N. W. 167—where, under a law passed subsequent to the injury increasing the maximum amount recoverable in such cases and plaintiff sought to recover the increased amount, the court held that such subsequent law, in effect, created a new right of action as distinguished from a new remedy to enforce an existing right of action—is in harmony herewith. It was substantially held that the law not only did not, but could not, legitimately, have a retroactive effect; that rights growing out of a wrong must relate to the happening of the wrong itself.

The statute is not by its terms retroactive. If it were ambiguous on that point it would, on general principles, have to pass successfully the test of strict construction to be held retroactive in intent (*Vanderpool v. La Crosse & M. R. Co.* 44 Wis. 652, 663), and particularly so since it is somewhat penal in character, though, of course, not classible as a penal law, strictly so called. Then, again, the decision referred to and the result here is within the principle that the legislature cannot, if it would, pass a law creating new obligations based on past wrongs or acts, though it may provide new remedies for existing situations. *Klaus v. Green Bay,* 34 Wis. 628; *Lombard v. Antioch College,* 60 Wis. 459, 473, 19 N. W. 367.

So from any viewpoint the proposition suggested is surveyed it must be resolved in the negative in harmony with the circuit judge's decision.

By the Court.—Judgment affirmed.

YOUNG and another, Appellants, vs. MINER and others, Respondents.

January 13—February 1, 1910.

(1-3, 8) *Trial: Findings: Duty of trial judge: Appeal: Review in absence of findings: New trial.* (4-7) *Mortgages: Release of equity of redemption: Validity: Intention: Consideration: Evidence: Estoppel as to third persons.*

1. Under sec. 2863, Stats. (1898), the trial judge is required to make a finding upon each controverted issue of fact and also to state his specific conclusions of law thereon from which the ultimate judgment results.
2. A finding that at the commencement of the action plaintiffs had no right, title, or interest in the land described in the complaint, is not a finding of fact.
3. Although, because of the failure to make proper findings, the ground upon which the trial court based its judgment is left to conjecture, yet the supreme court will examine the evidence to

ascertain whether a fair preponderance thereof supports such judgment or would support a judgment the other way, or whether a new trial is necessary to a just determination of the rights of the parties.

4. In order to support a transfer of mortgaged land by the mortgagor to the mortgagee, terminating the right of redemption, it must be clearly shown that the conveyance or release was voluntary on the part of the mortgagor, was based upon an adequate consideration, was untainted by fraud, and that no advantage was taken of the debtor's necessities to drive a hard bargain.
5. The evidence in this case is *held* insufficient to show that by such a transfer the mortgagors intended to release all equity of redemption, or that the transfer was voluntary on their part.
6. Such a transfer, by embarrassed mortgagors to the mortgagee, of land worth from $2,000 to $3,000 for no consideration except the mortgage debt and some trifling additions, aggregating $900, cannot be sustained.
7. An estoppel as against the mortgagors making such a transfer to the mortgagee, in favor of a third person claiming title under such mortgagee, is not established by evidence which fails to show that the conveyance to such person was based upon a valuable consideration or even that he was ignorant of the mortgagors' rights.
9. In an action tried by the court in which there are no findings of fact upon the controverted issues and the record does not support the judgment for defendant but shows an incomplete trial and many things necessary of explanation to enable the court to do justice between the parties, the judgment will be reversed and the cause remanded for a new trial.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to redeem from a mortgage the south half of the southeast quarter of section 21, township 10, range 1 west, in Richland county, Wisconsin. It appeared that in 1895, 160 acres of land, including the above description, had by several heirs been transferred to one of them, namely, Jesse Young, under a family arrangement. He, on December 26, 1895, executed a mortgage thereon to J. W. Lybrand for $650, and immediately deeded the south half of the southeast quarter of the section to the plaintiffs, his brothers, subject to said mortgage and upon their agreement to support their mother, who

died in 1897. It is claimed that there was a verbal understanding that $300 of the mortgage should be assumed by the plaintiffs and the rest should be taken care of by Jesse. A few partial payments of interest were made from time to time until February 25, 1899. Jesse Young and the plaintiffs had made an additional mortgage to one Hallin for $94.47 which on February 9, 1898, had been transferred to J. W. Lybrand, and Jesse Young had transferred the north half of the 160 acres to a brother-in-law, Jasper Haller.

On February 25, 1899, Jasper Haller and the plaintiffs executed and delivered deed to J. W. Lybrand of all the premises, which the plaintiffs claim was not effectual to extinguish the equity of redemption, and the defendants claim was so effectual, and that it was based upon the discharge of the $650, the payment of the John Hallin mortgage, with interest, and the payment of a small judgment against the Youngs, all amounting to about $900 at date of said deed. Much evidence was offered as to this transaction and as to the subsequent conduct of the parties. Confessedly the plaintiffs remained in possession until some time in 1905, when they were evicted by some irregular process; also that they made some payments of what the plaintiffs call interest and the defendants now call rent. At the time of the deed to Lybrand there was an agreement entered into that the grantors might retain possession for the balance of the year 1899 upon payment of interest and taxes for that year, and a lease was made to Haller of the entire premises commencing January 1, 1900, in which the rent confessedly was the computed amount of the interest on $913, to wit, $64. J. W. Lybrand died soon after, and an undivided half of this property was conveyed by his son, R. C. Lybrand, to the former's daughter, *Nellie Miner,* by warranty deed, on July 8, 1901. The deed is not in evidence and there is no proof as to the consideration. *Nellie Miner* conveyed the south half of the southeast quarter to *James Shannon* by warranty deed on October 2, 1907.

After completion of plaintiffs' evidence, and one witness had been sworn and testified on behalf of the defendants to the circumstances attending the making of the deed in 1899, the court announced himself satisfied, stopped the taking of further evidence, made so-called findings merely to the effect that the deed to Lybrand was executed and that at the time of the commencement of this action the plaintiffs had no right, title, or interest in the premises, upon which judgment dismissing the complaint was entered, from which the plaintiffs appeal.

A. C. Vaughan, for the appellants.

L. H. Bancroft, for the respondents.

DODGE, J. The confusion of this case, from the multitudinous irregularities and errors of practice on the trial, in the preparation of the record for appeal, and in the printed case, are such that we have, most improperly, been driven to the necessity of examining, by consent of counsel, the original reporter's minutes and a mass of exhibits supposed to have been admitted in evidence but in no wise embodied in the bill of exceptions. The effect of such confusion is enhanced by the fact that the trial judge has failed of compliance with the requirement of sec. 2863, Stats. (1898), that he state in his written decision the facts found by him and his conclusion of law thereon. This duty has been the subject of frequent comment, explanation, and definition by this court, the result of which is that a trial judge is required to declare his conclusion upon each of the controverted issues of fact and also his specific conclusions of law thereon from which the ultimate judgment results. We commend the following cases to the attention both of judges and of counsel who, in the sustainment of judgments which they secure, may be seriously prejudiced by the omission of such findings as the statute commands: *Brown v. Griswold,* 109 Wis. 275, 85 N. W. 363; *Milwaukee Nat. Bank v. Gallun,* 116 Wis. 74, 92 N. W. 567;

Farmer v. St. Croix P. Co. 117 Wis. 76, 93 N. W. 830; *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603; *McKenzie v. Haines,* 123 Wis. 557, 562, 102 N. W. 33; *Sliter v. Carpenter,* 123 Wis. 578, 582, 102 N. W. 27; *McDougald v. New Richmond R. M. Co.* 125 Wis. 121, 103 N. W. 244; *Closuit v. John Arpin L. Co.* 130 Wis. 258, 110 N. W. 222.

The controverted issues in this case were: (1) Whether the plaintiffs physically executed the deed upon which defendants rely; (2) whether, if so, the intention of the parties was that a complete release and transfer of the equity of redemption should take place, or whether the parties contemplated a continuance of the former situation, namely, that the property should still be held as security redeemable by the mortgagor; (3) whether, if intended as an absolute conveyance, it was (a) voluntary on the part of the mortgagor; (b) based on an adequate consideration; (c) untainted by fraud; and (d) with no advantage taken of the debtor's necessities by driving a hard bargain; (4) whether the defendant *Nellie Miner* was an innocent purchaser without notice relying on the record title; (5) whether the defendants *Shannon* were such purchasers; and (6) whether the plaintiffs were estopped by certain eviction proceedings. On no one of these issues, except the first, are we informed by the findings of the judge's conclusion of fact, nor which of such facts justified a conclusion of law supporting the judgment rendered. The so-called findings, after declaring the execution of two certain deeds, one of which was undisputed, and the other was the deed from plaintiffs and Haller to Lybrand in 1899, declare only that "at the commencement of this action the plaintiffs nor either of them had any right, title, or interest in the lands described in the complaint." This is of course not a finding of fact, but a conclusion of law from some other facts. Whether such absence of title resulted from the deed to Lybrand, from rights of one or other of the defendants as an innocent purchaser, or from some judgment estoppel against the plaintiffs,

is left to mere conjecture. The judgment, therefore, is permeated by error, and yet in the anxiety that justice may be done as speedily as possible, we should under the view suggested in *Brown v. Griswold, supra,* ascertain whether it is supported by a fair preponderance of the evidence or whether such fair preponderance of the evidence supports a judgment the other way, unless the whole record leaves us in such doubt as to justify serious apprehension of possible injustice from an attempt to ascertain the real rights of the parties from an inadequate and imperfect trial, unaided by any intelligible decision of the trial judge thereon. We proceed, therefore, to an examination of the evidence.

We probably should not be able to say, as against a distinct finding that plaintiffs physically executed the deed, that any clear preponderance of evidence sufficient to overcome it appears. When, however, we come to consider the intention of the parties in making such a deed there is much very persuasive evidence in favor of the claim of the plaintiffs that the deed was not intended to presently terminate the relation of mortgagor and mortgagee. The plaintiffs all testified that only a mere contract was intended, and the only plaintiff having direct negotiation with the agent of Lybrand testifies that it was made merely to enhance his security and avoid the expenses of foreclosure and define his right to possession. When we turn to the testimony of that agent of Lybrand we find that, while he asserts that the plaintiffs fully understood that it was a deed, still that it was made to avoid expense of foreclosure proceedings, and that it was agreed at the time that no change in the possession should take place till nearly a year later, at which time the grantors were to have an option to acquire or retain the property by paying a sum exactly equal to the debt and were to pay "interest" to the end of the year. There was also a promise of a lease after the first year had terminated at a rate of rental ascertained as the amount of the annual interest at seven per cent. on the sum so found

to be due. There is no testimony that the evidences of indebtedness were surrendered at the time of the making of the deed, and the record discloses that the written releases of the mortgages were not made until some months later. Such a state of facts points strongly to a mutual understanding that the relations theretofore existing of ownership on one hand and security on the other for a debt which drew interest were not presently terminated. It must also not be forgotten in that connection that the lay mind, even one so trained as that of the country banker, Pier, does not always accurately distinguish between transfer of title and record evidence of ostensible transfer which is practically tantamount to title for the purpose of sale and conveyance. Doubtless Pier, the agent, intended to take and record such a deed as would enable Lybrand to sell and convey without the expense of foreclosure, at least to an innocent holder, but whether his thought went further than that is by no means clear in light of the authorities, to which we shall subsequently refer.

If, however, we assume the intention of the parties to have been a release of all equity of redemption, there arises the question whether the plan was voluntary with the debtor, or whether it was the result of pressure or coercion following from inability to presently pay, and the threatened probability of foreclosure proceedings, with consequent enhancement of the debt. It is disclosed by the testimony of Pier that the plan of conveyance or surrender of the land did not originate with the plaintiffs or with Lybrand; that they had at all times been struggling to meet their payments of interest; that Pier insisted either on payment of all interest, including the arrears, or that they convey the property or submit to foreclosure, insisting to them that their conveyance would relieve both parties from the expenses of foreclosure and be no detriment to them, because their equity, though perhaps of some value, would be eaten up by another year's interest and expenses of foreclosure.

Further than this, however, is the query whether such transaction was upon adequate consideration, fair, and not suggestive of a taking advantage of the situation of an embarrassed debtor to drive a hard bargain, which, it is said in *Lynch v. Ryan,* 132 Wis. 271, 111 N. W. 707, 112 N. W. 427, must be made to clearly appear. As to the consideration, it is asserted by respondents that, in addition to Lybrand's mortgage of $650 and accumulated interest, Lybrand paid off a mortgage to one Hallin amounting with accrued interest to $120, and that he paid some judgment against some one for $20. But it appears by documentary evidence introduced that he did not pay at the time of, and as a consideration for, this conveyance, the Hallin mortgage. That mortgage was assigned to him by written instrument dated more than a year before the deed transaction, and therefore was at most merely a part of the mortgage debt and not a new and additional consideration from grantee to grantor, at least so far as appears by the present evidence. Indeed, as previously stated, there is no evidence that either that debt or the original mortgage debt of $650 was satisfied at the time of the deed. But if that fact be assumed, the total of consideration was barely $900. The evidence at present in the record seems overwhelming that the real estate conveyed was of far greater value. Witness after witness, of apparently most respectable character and well qualified to judge as to farm values, neighbors owning land, many of whom had been town officers, assessors, or the like, testified to values in 1899 ranging from $2,000 to $4,000, and most of them supporting a value of over $3,000. Against this there is no particle of evidence except that of Mr. Pier, probably an entirely honest but yet prejudiced witness, that in 1895, at the time the Lybrand mortgage was taken, he placed a value of $1,200 on the land as a conservative estimate on which to loan money. It is in evidence that such lands as those involved have enhanced rapidly in value since the depression following the panic in

1893, which, as is matter of common knowledge, was most acute about 1895, at the time Pier examined and valued the land. Much land in this state advanced greatly in value between the years 1895 and 1899. Therefore the testimony of Pier is hardly in conflict with that offered by the plaintiffs. In the light of the authorities to which we shall shortly refer, we think no court could justify the transaction of inducing an embarrassed mortgagor to convey the mortgaged premises of value $2,000 or $3,000 to the mortgagee for no consideration but the mortgage debt and some trifle in addition thereto, aggregating $900.

The rules of law governing the relations between mortgagor and mortgagee with reference to acquisition of mortgaged land by the latter have been long settled and were last announced by this court in *Lynch v. Ryan, supra,* where it was said that in order to support such a transfer and terminate the pre-existing right of redemption by payment of the debt, "it must be clearly shown that the conveyance or release was voluntary on the part of the mortgagor, was based upon an adequate consideration, was untainted by fraud, and that no advantage was taken of the debtor's necessities to drive a hard bargain. . . . In doubtful cases the courts incline to hold that the mortgage relation still exists." The reason of this rule is obvious. When one gives a lien upon his land to another as security for a debt, public policy does not permit him in advance to agree to any forfeiture of his right of redemption otherwise than in the manner prescribed by statute, namely, that of a judgment declaring the amount due and, after a year for redemption, directing the premises to be sold to raise the money due to pay such debt. The creditor's right is to his money, not to the land. But, in common experience, the man reduced to the necessity of borrowing money upon mortgage security is often, if not commonly, in a situation where oppression is easy, and where a serious temptation is offered to the mortgage creditor to avail himself of the oppor-

tunity to secure the entire land without according the protection of a public sale to assure an adequate price. The rule tersely stated in *Lynch v. Ryan* is supported by many decided cases in Wisconsin, a few of which here cited present situations of much analogy to that disclosed by the present record. *Rockwell v. Humphrey,* 57 Wis. 410, 15 N. W. 394; *Hunter v. Maanum,* 78 Wis. 656, 48 N. W. 51; *Schierl v. Newburg,* 102 Wis. 552, 556, 78 N. W. 761. The result is that we fail to find any preponderance of evidence to prove the elements essential to the validity and effectiveness of the deed. Indeed, we are clear that the present evidence discloses a lack of adequate consideration and complete fairness.

We are unable to find any evidence to establish estoppel against the plaintiffs in the case of *Nellie Miner.* Her title to an undivided half of the land appears to have come by descent from J. W. Lybrand, so that her title could be no better than his. As to the other half, it came to her by conveyance from her brother, but there is no evidence as to whether such conveyance was based upon a valuable consideration or whether she even claims ignorance of the plaintiffs' rights in the land. It does appear, however, that at the time of her deed the plaintiffs were in open and notorious possession of the premises. As to *Shannon,* there is also entire absence of evidence as to the good faith of his purchase or as to any valuable consideration; while it also appears that he was a neighbor living in the vicinity, from which is inferable his knowledge of the possession and occupation of the premises by the plaintiffs while it continued. True, it also appears that at the time of his deed they had been evicted by some process claimed to be invalid. The circumstances of that eviction, which is claimed to have been under judicial process, are not at all shown by any of the evidence before us so that it can be determined whether there has been any adjudication sufficient to estop the plaintiffs from setting up their title.

However, we do not feel that it would be safe to render a

judgment either for plaintiffs or defendants upon the very irregular trial. While the present record would seem pretty clearly insufficient to support the judgment for the defendants, yet it discloses that as soon as one witness had testified for the defense, namely, Mr. Pier, the court interposed and refused to hear any further evidence on defendants' part and, inferentially, any evidence in rebuttal. There are many things which are at least possible of explanation upon one side or the other and as to which explanation seems necessary to the ascertainment of rights and rendition of complete justice. We therefore deem it our duty to remand for a new trial.

By the Court.—Judgment reversed and cause remanded for new trial. No costs will be allowed for printing case.

McFarland and another, Respondents, vs. Zahl, Appellant.

January 13—February 1, 1910.

Continuance: Absence of witness: New trial: Discretion.

Denial of a motion for a continuance because of the absence of a material witness, and subsequent refusal to set aside the judgment and grant a new trial, are *held* to have been justified upon conflicting affidavits respecting the grounds alleged and the good faith of the moving party.

Appeal from a judgment of the circuit court for Wood county: Chas. M. Webb, Circuit Judge. *Affirmed.*

This is an action to collect the commission of the plaintiffs as real-estate brokers for negotiating and consummating the sale of a certain parcel of real estate which belonged to the defendant. The complaint alleges that on October 1, 1906, the plaintiffs had the premises listed with them by the defendant, the agreement being that the plaintiffs were to have whatever they might procure for the land in excess of $8,400. It

is alleged that the plaintiffs advertised the land, procured abstracts, secured and brought many would-be purchasers to look over the land, and that they expended money and time in carrying out their contract. Plaintiffs allege that they informed the defendant that the land was worth more than he asked for it, and that the price for which the land was to be sold was thereupon fixed at $12,000, and if the plaintiffs effected a sale thereof they were to receive a commission of five per centum. It is alleged that they succeeded in making the sale and that they bring this action to recover their commission.

The action was commenced in Langlade county and issue was joined on June 22, 1907. The action was duly noticed for trial in Langlade county and was called for trial at the November term of the court in 1907, but the defendant filed an affidavit of prejudice and the case was thereupon removed to the circuit court for Wood county. The case was noticed for trial at the May term in 1908 of the Wood county circuit court, but the defendant procured an affidavit from a physician stating that his wife was likely to be confined during the week during which the case would be tried and that he could not safely leave her. The plaintiffs' attorney thereupon consented to a continuance of the case, relying on the truth of the affidavit. He now states that he afterwards learned that the defendant's wife was not confined until two months later. On September 21, 1908, notice of trial was given for the term of the court to be held on October 5, 1908. On the first day of the term the defendant moved for a continuance until the next regular term of the court, and presented an affidavit in which he averred that a witness whose presence was indispensable for his defense was absent from the state and could not be secured for that term of court. A counter affidavit was presented averring that the witness was then within the city of Antigo and within reach of a subpœna. The court reserved its ruling on the motion. When the case was reached on the day calendar of October 8, 1908, the motion was renewed upon affidavits then presented to the effect that the

missing witness had for some time previous been in the northern part of the state; that his whereabouts were unknown; that he could not be found; and that the defendant had not aided the witness to evade the service of the subpœna. Counter affidavits were offered to the effect that the missing witness had been seen in the city of Antigo by several persons a number of times during the preceding week or ten days. The court denied the defendant's motion and also a motion to place the case at the foot of the calendar. The trial then proceeded. The plaintiffs presented evidence tending to sustain the allegations of the complaint, and on the evening of October 8, 1908, rested their case. The court took a recess until 9 o'clock the following morning, when the attorney for the defense stated that he had not heard from his client and that no defense could be made by evidence. The court then granted a motion for direction of a verdict in plaintiffs' favor. On January 23, 1909, judgment was entered upon the verdict so directed.

On April 17, 1909, the defendant's attorney moved the court to set aside the judgment and to grant a new trial upon the record. He presented defendant's affidavit to the effect that he had endeavored to have the missing witness subpœnaed for the trial; that he had presented the subpœna to the sheriff of Langlade county with instructions to serve it; and that he had not advised or aided the missing witness to evade the service of the subpœna. The affidavit also states that the defendant had attempted to leave Antigo on the morning of October 8, 1908, and that *en route* to Grand Rapids, the place of the trial of the action, he and his attorney were to prepare an affidavit for use on his motion for a continuance of the action, but that owing to the incorrectness of his timepiece he missed the train; and that he asked his attorney by telegram whether he should come to Grand Rapids, but that he did not receive a reply until the next morning, too late for him to be present at the trial.

An affidavit of the missing witness was also presented to the

effect that while he was present at his boarding house on the evening of October 5, 1908, when the marshal of the city of Antigo and another man came there, he overheard that the defendant had had a search-warrant issued for him, and that he ran out of the back door and avoided the service of the subpœna because his attendance at the trial at that time would interfere with his business. The affidavit also states that the defendant had not asked him to avoid the service of the subpœna.

Other affidavits in defendant's behalf were presented tending to deny the plaintiffs' claims for opposing the continuance of the case.

The sheriff of Langlade county made affidavit that when the defendant placed in his hands the subpœna for the missing witness he left with him no witness fees or any *per diem* to be paid or tendered to the witness, and that when requested so to do he asserted that he would settle with the witness. He also called twice at the boarding place of the witness, and he states that the residents of the house seemed to know his errand without having been told by him.

The marshal of the city of Antigo made affidavit that he overtook the missing witness when he left his boarding house on October 5, 1908, and that the witness gave him to understand that the defendant was anxious that the missing witness should not be found, and that it would mean more money to the marshal if he would not serve a subpœna on him.

These and other affidavits presented state that the reputations of the defendant and of the missing witness for truth and veracity are bad and that they could not be believed under oath.

At the conclusion of the argument on the motions to set aside the judgment and to grant a new trial the court denied the motions, with costs.

This is an appeal from the judgment and from the order of the court denying the continuance.

Geo. W. Latta, for the appellant.
T. W. Hogan, for the respondents.

SIEBECKER, J. From the foregoing statement it is manifest that the facts presented in the affidavits of the respective parties raised a sharp issue of fact respecting the grounds alleged and the good faith of the defendant in making the application for a continuance of the case on the first day of the term of the court at which the case was noticed for trial, and on the renewal thereof, when the case was reached on the trial calendar, as well as on the application for a new trial. An attentive perusal of the affidavits in connection with the facts and circumstances disclosed by the record in the case leads us to the conclusion that the trial court was justified in refusing the application for a continuance and in denying defendant's motion for a new trial.

By the Court.—Judgment affirmed.

FISHER, Administrator, Respondent, vs. WAUPACA ELECTRIC LIGHT AND RAILWAY COMPANY, Appellant.

January 13—February 1, 1910.

Street railways: Killing of traveler on highway: Frightening horse: Negligence of motorman in failing to stop car: Duty as to fenders on cars: Evidence: Instructions to jury: Cause of death: Appeal: Questions of fact: Proximate cause: Damages.

1. In an action for death of a person who was thrown from a buggy upon the track and run over by an electric car, the evidence is *held* sufficient to warrant the jury in finding that the motorman was negligent in failing to stop the car before it reached the deceased.
2. The enactment of ch. 390, Laws of 1907 (sec. 1636—58, Stats.), making compulsory the use of fenders on the cars of street and interurban railways, made manifest at once the legislative intent of the necessity for such safety devices, even though the act was not to go into effect until a future date.

3. In view of the common-law duty of a street railway company so to use the streets as to regard the safety of the traveling public, and of sec. 1862, Stats. (1898), providing that railways must be constructed on the most approved plan, and of provisions in the franchise of the defendant company under which it was bound to use all reasonable care to prevent injury to persons or property, failure to equip its cars with fenders after the enactment of ch. 390, Laws of 1907, may have been negligence on the part of defendant, even though at the time in question said act of 1907 had not yet gone into effect.
4. In an action for the death of a person run over by a street car which was not equipped with a fender, testimony of an expert that the most approved plan of construction required a fender to pick up objects in front of the car was competent.
5. It was not error in such a case to exclude evidence that a good-sized dog on a track in another city was not protected by a fender.
6. Submission to the jury in such case, as a matter of fact to be determined by them, of the question whether defendant's duty to the public required it to equip its cars with fenders, was not error.
7. An instruction to the effect that the absence of the fender would not render defendant liable unless the jury believed that, if a fender had been provided, it "would have contributed or tended to protect or save [the deceased] from death or injury," was not erroneous and was in better form than had the quoted portion read "would have in fact saved the deceased from death."
8. Where, as a rapidly moving street car approached, a horse reared and suddenly turned around, throwing one of the occupants of the vehicle upon the track in front of the car, which passed over her, and the motorman testified that when the horse reared he apprehended danger, it cannot be said that the injury could not have been foreseen.
9. The evidence in this case was sufficient to warrant the jury in finding that plaintiff's intestate was killed by defendant's car running over her and not by her fall from a buggy to the track.
10. Upon appeal, on the question whether the verdict is supported by the evidence, the opinion of the trial judge, who refused to disturb the verdict, is entitled to weight.
11. Admission in evidence of the franchise under which a street railway company was operated was not error prejudicial to the company, even if such franchise was admitted in the answer.
12. The competency of a motorman at the time of an accident being in question, evidence as to his competency when he first began to work, a few days before, was relevant and material.
13. Failure, in charging the jury, to define proximate cause is not error where no specific instruction relating thereto was requested.

14. In an action for death of a person who, by the sudden turning of a frightened horse, was thrown from a buggy upon a street-car track and was run over by a car, an instruction to the jury that "there is or may be a difference between the operation of such a car on city streets and upon country roads outside of the cities, where opportunities are not so frequent for horses and drivers to become accustomed to the presence and dangers of running such cars," was not prejudicially erroneous.

15. An instruction to the effect that, if the motorman had reason to apprehend from what he saw that the horse was likely to become unmanageable, it was his duty to use his best efforts, making use of all the means at his command and all the methods and appliances upon his car, to stop the car as quickly as could thereby be done, if so doing would be likely or tend to avoid injury to persons or property, was not erroneous, there being evidence that the motorman did not use the reverse lever and that its use was necessary to make an emergency stop.

16. An award of $3,500 for the death of a well-educated married woman, thirty-eight years old, who before marriage was capable of earning $60 per month, and since her marriage had, besides performing her household duties, assisted her husband in performing his duties as railroad station agent, was not excessive.

MARSHALL, J., and WINSLOW, C. J., dissent.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This action was brought by *J. F. Fisher,* administrator of the estate of Janet W. Fisher, deceased, against the defendant to recover damages for the death of Janet W. Fisher, caused by defendant's negligence in equipping and operating its cars on its electric railway. The case was submitted to the jury on a general verdict, and the jury found in favor of the plaintiff and assessed his damages at $3,500. The defendant owns and operates an electric railroad extending from the Wisconsin Central depot in the city of Waupaca to the Grand View Hotel on the Chain of Lakes west of Waupaca city, the length of the road being a little less than five miles. The road extends through the town of Farmington in Waupaca county. On the 16th day of April, 1908, in the afternoon, in the town of Farmington, and eighty rods west of the city limits of Waupaca, Mrs. Fisher was killed, and her death is claimed by plaintiff to have been caused by being run over by a car on the defendant's road going westward at the point in question.

The deceased and her sister-in-law, Mrs. Wolcott, were riding in a single rig or buckboard going toward the city of Waupaca, when the horse became unmanageable at the approach of the car and suddenly turned around, throwing Mrs. Fisher out upon the car track in front of the approaching car, which passed over her. The litigated questions in the case were whether the defendant was guilty of any negligence which was the proximate cause of the injury, and the amount of damages. A motion to direct a verdict for the defendant was denied, and the usual motions after verdict were made and overruled and due exceptions taken, and judgment entered on the verdict in favor of the plaintiff, from which this appeal was taken.

C. H. Hamilton and *B. B. Park,* for the appellant.

For the respondent there was a brief by *Gill, Barry & Mahoney,* and oral argument by *T. H. Gill.*

The following opinion was filed February 1, 1910:

KERWIN, J. Error is assigned because the court refused to direct a verdict in favor of the defendant, for the reason that neither negligence nor proximate cause had been shown upon the undisputed evidence. This contention is based upon the claim that the death of Mrs. Fisher resulted from an unavoidable accident, even if she were killed by the defendant's car, and further that it does not appear from the evidence that she was killed by the car, but by being thrown from the buckboard in which she was riding. The questions involved under this head are purely questions of fact. Without going into any extended discussion of the evidence we will refer briefly to some of the leading facts which the evidence tends to prove.

The evidence shows that upon the day in question the deceased, without negligence on her part or on the part of the driver, Mrs. Wolcott, was thrown from a buckboard in which she was riding upon the street-car track in front of an approaching car, run over, and killed. The car was being oper-

ated by a boy seventeen years of age at a salary of $25 per month, who prior to the accident had had very little experience as motorman, and did not use all the means at hand necessary to stop the car as quickly as it might have been stopped before running over the deceased. The track was straight and level and the horse seen at a distance of 500 or 600 feet, and when the car was within between 200 and 250 feet from the horse it reared up and acted frightened and the motorman realized the danger. The horse reared up a second time immediately after the first, turned quickly around toward the track, overturning the buckboard, and throwing deceased upon the track some twenty to twenty-five feet ahead of the car, which had been moving at the time the horse first reared up at from twelve to twenty miles an hour. Deceased fell with her breast upon the rail, head between the rails and about six or seven feet from the buckboard from which she was thrown, and her feet about two feet from the buckboard. The car passed over the body and stopped between thirty and forty feet from it. Immediately thereafter deceased made movements of the lips and sounds as though endeavoring to speak. Upon examination it was found that the neck was broken, the back broken in two places, and one arm broken. The car was equipped with a hand brake, a controller lever to regulate the current, and reverse lever to change the gear and machinery. In order to make an emergency stop the current must be shut off, the machinery reversed, the current again applied, and the hand brake used. Under the circumstances the car could have been stopped, upon the appearance of the danger, in forty to fifty feet. The motorman understood the appliances, but failed to use the reverse lever or current, relying upon the use of the hand brake. The ordinance or franchise under which the defendant operated provides:

"Sec. 22. Employees of said street railway shall use all proper and reasonable care and diligence to prevent any injury to persons and property, and on the appearance of danger

to any one on or near the track the cars shall be stopped when by so doing injury may be avoided, or when teams become so frightened as to be liable to become unmanageable by their drivers."

The car was not provided with a fender, although fenders had been in use many years prior to the time of the injury and since. A physician who examined the body shortly after the injury testified that death was instantaneous, and might have been caused by the fall from the buckboard or by the passage of the car over deceased; and further says that there were very few and slight bruises and practically no external marks; that the neck might have been broken by the violent rotation of the head. There is also some evidence tending to show that the current was not shut off at all, but that the motorman stopped the car by use of the hand brake, and that immediately after the accident he exclaimed, "If I had only thought to turn off the controller." The evidence further shows that the horse reared up twice; there could not have been half a minute between the time he reared first and last; he fell close to the track at or about the time the occupants fell from the buckboard, which was cramped on a forward wheel, causing it to tip over. The most approved plan of construction of defendant's street car required a fender to pick up objects in danger of being run over by the car. The fenders put on defendant's cars after the injury, and which were on at the time of trial, were an inch or inch and a half above the rail.

The foregoing is the substance of some of the material evidence produced upon the trial bearing upon the error assigned on refusal to direct a verdict. Now upon the facts in evidence the main questions were: Was there sufficient evidence to warrant the jury in finding that the motorman was negligent in failing to stop the car before it came in contact with the deceased? and, Was deceased killed by the car? It is insisted by appellant that without the evidence of a witness,

Woodnorth, there is not sufficient evidence to support the verdict, and that his evidence is incredible. Woodnorth was not impeached. He appeared to be a man of education, good standing, and disinterested, and was in position to see and observe what occurred. Moreover, his evidence, while it does not coincide exactly with that of the witness Smith as to the distance from the horse to the car at the time the horse reared up, corroborated his evidence in many respects. Smith testified in substance that he was on the car and saw the horse and two ladies in the conveyance coming when 250 to 300 feet away; that he turned his face in response to a friend who spoke to him, and when he turned back he saw the horse rear, turn half across the road, and jump and continue to jump, and the next jump he made he turned the buggy over; that his attention after he first saw the horse was diverted just for a second, and when he next looked at the horse he was twenty-five feet from the track and the car was probably 100 feet from deceased; that he felt the brake being set, and that was what called his attention to look at his friend; that he felt the jar; that he felt the brake before he saw the horse in the air. So it will be seen that this evidence, properly considered, with due allowance for slight variance as to distance and time between the first sight of the horse and the accident, corroborated Woodnorth. It is quite apparent that the motorman saw the horse rear and apprehended the danger when more than 100 feet from him, even upon the evidence of Smith, and this rearing was doubtless the second time. Even on this evidence the jury would have been justified in finding that due diligence was not used by the motorman, because there is credible evidence that the car could have been stopped by the proper use of the appliance within a distance of seventy-five feet or less when going at fifteen miles per hour, and there is evidence that it was going slower and the car more than 100 feet away when the horse was rearing and plunging toward the track. Moreover, the car ran from thirty to forty

feet after striking deceased, which according to Smith's evidence would make a run of at least 130 or 140 feet after the horse reared and jumped toward the car, while the car could have been stopped by proper management within sixty-five or seventy-five feet.

There is also the question of whether the car was constructed upon the most approved plan, in consequence of the lack of a fender; and while ch. 390, Laws of 1907 (sec. 1636—58, Stats.), providing for use of fenders, did not go into effect until after the injury in this case, it was passed before, and made manifest at once upon its passage the legislative intent of the necessity for such safety device. At common law the defendant was bound to so use the street as to regard the safety of the traveling public. Its use of it was a joint use with the public, and neither defendant nor the public has a right to endanger the use by the other. *Fitts v. C. C. R. Co.* 59 Wis. 323, 18 N. W. 186. And independent of the rule at common law and sec. 1862, Stats. (1898), which provides that street railways must be constructed on the most approved plan, the defendant under its franchise was bound to use all reasonable care to prevent injury to persons and property, and on the appearance of danger stop its car when by so doing injury might be avoided.

The point is made that the resultant injury could not have been foreseen, because no one could apprehend that the horse would turn and jump upon the track in front of the approaching car. But the motorman testified that when the horse reared he apprehended danger, as he well might when a horse so acted in such close proximity to a rapidly approaching car. The point is not well taken. *Butler v. M. & St. P. R. Co.* 28 Wis. 487; *Kujawa v. C., M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249; *Sarles v. C., M. & St. P. R. Co.* 138 Wis. 498, 120 N. W. 232.

Again, it is argued that the negligence of defendant, if negligence was shown, was not the proximate cause of the injury,

because it does not appear from the proof that the deceased was killed by the car. Of course upon this point, as well as upon the point of defendant's negligence, all that was necessary was sufficient evidence from which the jury would be entitled to find the fact. The vehicle in which deceased and Mrs. Wolcott were riding was quite low, a buckboard, and deceased was not thrown far when she fell; her feet being only about two feet from the buckboard. From the external evidence of bruises and injuries the inference is strong that she was killed by being run over by the car and not by being thrown from the buckboard. The marks on the body and its position and appearance when found, in connection with the further fact that the horse fell at or about the time the buckboard tipped and the occupants fell out, further support the idea that the deceased was killed by the car and not by the fall from the buggy. There are other facts and circumstances which we need not detail supporting the inference that the deceased was killed by the car and not by the fall from the buckboard. We have also the judgment of the learned trial judge who heard the evidence, and whose opinion on that, as well as upon all other facts in the case, on refusal to disturb the verdict, is entitled to weight. We are therefore forced to the conclusion that we should not disturb the verdict on the question of defendant's negligence or the proximate cause of the injury. *Wilson v. C. V. E. R. Co.* 120 Wis. 636, 98 N. W. 536; *Gessner v. Roeming,* 135 Wis. 535, 116 N. W. 171; *Gould v. Merrill R. & L. Co.* 139 Wis. 433, 121 N. W. 161.

Error is assigned upon the admission of the ordinance or franchise of the defendant in the town of Farmington, on the ground that said franchise is admitted in the answer; hence the admission of an admitted fact was error. It is at least doubtful whether the answer admitted the franchise alleged in the complaint; but even if it did there was no prejudicial error in admitting the evidence.

Error is assigned on the admission of evidence respecting the competency of the motorman when he first began to work, on the ground that his competency, if material at all, should have been confined to the time of the injury. But his knowledge of the work at the time he began work was competent as bearing upon his competency at the time of the accident, in view of his limited experience as a motorman before the injury. His competency was in issue and the evidence material and relevant. Nor was there prejudicial error in the admission of evidence respecting the condition of the lever of the controller after the accident; its weight was for the jury.

Error is assigned on the admission of the evidence of an alleged expert respecting the proper equipment of the car, on the ground that it was not shown that he was qualified to testify as an expert. The evidence respecting his qualification to testify as an expert was sufficient, and his evidence to the effect that the most approved plan of construction required a fender to pick up objects in front of the car competent, in view of statutes and the franchise. *Fitts v. C. C. R. Co.* 59 Wis. 323, 18 N. W. 186; *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 40 N. W. 487; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29, 69 N. W. 791.

There was no error in excluding evidence offered to show that a good-sized dog on a track in Rockford, Illinois, was not protected by a fender.

Several errors are assigned upon the charge. The court charged the jury that the defendant's car was running at a negligent and reckless rate of speed, but this was said by way of presenting to the jury the issues in the case as claimed by the plaintiff, and the court in another part of the charge distinctly told the jury "that the rate of speed of the car as it approached the conveyance in which Mrs. Fisher was riding was not negligent." Nor was the statement of the provisions of the ordinance prejudicial error when considered in connection with the whole charge. The whole charge, when read to-

gether, respecting the duty of the defendant under the franchise as well as at common law was a fair statement of the law as applied to the facts proved.

The error assigned on failure of the court to define proximate cause is without merit. No request was made for such specific instruction, hence no prejudice resulted from failure to give it. *Miles v. Stanke,* 114 Wis. 94, 89 N. W. 833.

Error is assigned on the charge respecting use of fenders as a proper equipment. The subject has been heretofore referred to in regard to admission of evidence. The evidence showed that fenders had been in use, and were necessary in complying with the law as to the most approved plan of construction. The court charged:

"Whether or not the defendant, as a duty to the public, should have provided a fender as a necessary part of the equipment of the car in the interest of safety to the public or of persons who may come or be upon or in the vicinity of the defendant's cars, is a question of fact to be determined by you, as jurors, from the whole evidence. If you shall be therefrom affirmatively satisfied, in the manner stated, that it was such duty of the defendant to provide and maintain a fender, in such case you should so find. If not so affirmatively satisfied that it was the duty of the defendant to operate its cars with a fender, in such case you should so find."

We find no error in this portion of the charge. Sec. 1862, Stats. (1898); *Fitts v. C. C. R. Co.* 59 Wis. 323, 18 N. W. 186; *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375, 39 N. W. 856.

Error is assigned on the following portion of the charge:

"There is or may be, however, a difference between operation of such car on city streets and upon country roads outside of the cities, where opportunities are not so frequent for horses and drivers to become accustomed to the presence and the dangers of running such cars."

The obvious intention of the learned judge was, in giving this portion of the charge, to impress upon the jury that all the facts and circumstances surrounding the situation must be

taken into account. It appears from the photographs produced upon the trial that the street railway track was on the south side of the highway, leaving the traveled track for teams wholly on the north side, so that teams were compelled to travel on the north side of the car going either way, contrary to the usual custom of passing where the track is in the center of the street. This and other facts and circumstances, some of which are mentioned by counsel for respondent and apparent to the trial judge, may well have justified the distinction drawn in the charge. But in any event we cannot say prejudicial error was committed in this regard.

The following portion of the charge is complained of:

"In this case, if you shall find from all the evidence before you that the motorman, under the circumstances shown, had reason to apprehend from what he saw that the horse was likely to become unmanageable and run away or otherwise injure himself or the persons in the carriage, it was his duty to use his best efforts, making use of all the means at his command and all the methods and appliances upon his car, to stop the car as quickly as could thereby be done, if so doing would be likely or tend to avoid danger of injury or danger to any persons or property in peril. If you shall so find that the motorman neglected to do anything so reasonably required of him, under the circumstances as above stated, if they existed, and such failure or negligence upon his part was the proximate cause of the death of Mrs. Fisher, it will be your duty to return your verdict for the plaintiff in this action."

We find no prejudicial error in this part of the charge. It is said that the evidence is undisputed that by the use of the reverse lever the car could not have been stopped in the distance that it was. But even if it were, it would not make the charge reversible error. But the evidence is not undisputed. There is evidence that to make an emergency stop the reverse current is necessary.

Nor do we find prejudicial error in the portion of the charge to the effect that if a fender had been provided it would have "contributed or tended to protect or save Mrs. Fisher

from death or injury," on the ground that the instruction should have been to the effect that the fender would have in fact saved Mrs. Fisher from death. We think the instruction was in better form as given than as suggested.

It is lastly insisted that the damages are excessive. The deceased was thirty-eight years of age, well educated; before marriage was capable of earning about $60 a month, and since her marriage, in addition to performing her household duties, had rendered assistance to her husband in the performance of his duties as railroad station agent. Under the repeated decisions of this court we do not feel justified in holding that the damages awarded are excessive. *Stutz v. C. & N. W. R. Co.* 73 Wis. 147, 40 N. W. 653; *Brown v. Vannaman,* 85 Wis. 451, 55 N. W. 183; *Donovan v. C. & N. W. R. Co.* 93 Wis. 373, 67 N. W. 721; *Hayes v. C., M. & St. P. R. Co.* 131 Wis. 399, 111 N. W. 471; *Ewen v. C. & N. W. R. Co.* 38 Wis. 613; *Ryan v. Oshkosh G. L. Co.* 138 Wis. 466, 120 N. W. 264; *Pfister v. Milwaukee F. P. Co.* 139 Wis. 627, 121 N. W. 938; *Wankowski v. Crivitz P. & P. Co.* 137 Wis. 123, 118 N. W. 643. We think the case was fairly tried and no prejudicial error committed.

By the Court.—The judgment of the court below is affirmed.

The following opinion was filed February 19, 1910:

MARSHALL, J. (*dissenting*). I think the case was submitted to the jury upon a wrong theory and has been likewise affirmed here.

The idea of the learned circuit judge was, and the idea of my brethren likewise is, that if a reasonably careful motorman could have stopped the car within a space less than 100 feet, then it was for the jury to say whether the motorman, in this instance, did all he ought to have done or not, since there was evidence from the mouth of one witness that the horse

was that distance ahead of the car when it first was observed in a condition to suggest necessity of stopping the car to prevent injury to the driver.

Now we may safely admit, for the purpose of this case, that, as the witness put it, the horse was probably 100 feet away when he first showed signs of fright, though the evidence is so strong that the distance was much less, it is difficult to see how twelve men could have concluded to a reasonable certainty that the distance was as suggested; and we may also safely concede that a car, properly equipped and managed, can be stopped in a distance of seventy-five feet. Do those concessions justify the finding by the jury and affirmance here? I do not think so.

Appellant owed no duty, at its peril, to stop the car as soon as a car properly equipped could be stopped on such a track as the one in question. There is, in my judgment, no rule in the law of negligence requiring such a high degree of care. The limit of appellant's responsibility was to bring the car to a stop as soon as a reasonably prudent motorman, in the exercise of ordinary care, his car being properly equipped, could be reasonably expected to, under the circumstances. It will occur, it would seem, to an ordinary person of ordinary experience in life, that an emergency stop in the circumstances here must be quite different from a practice emergency stop, the motorman having clearly in mind what he is to do, *i. e.* to see how quickly he can bring his car to a stop when going at fifteen miles per hour. It may well be that the stop could be made within a space of seventy-five feet and, with the same car, the motorman proceeding without reason to apprehend danger till confronted with imminent peril of taking human life, as in this case, such motorman using all the care which could be reasonably expected of an ordinarily careful and skilful operator, the car would go twice seventy-five feet before coming to a stop. This class of cases do not properly go upon possibility but upon reasonable probability, under all the circumstances. Such, it seems, is the law of negligence.

The car, in this instance, was running twenty feet or more per second, and rightfully so. A man of extraordinary care may comprehend a situation instantly and at the same instant do the proper thing. But that is not the standard by which to measure what ought to have been done in this case. What could reasonably be expected of the ordinary man under the circumstances of such a sudden and imminent peril? That is the point. It takes a little time for the inertia of the human mind, ordinarily, to be overcome. After being put in motion the actor is not to be held wanting in ordinary care if he does not instantly do the proper thing and with necessary efficiency. One, in acting in such great peril to escape doing injury to another, should not be held to any greater efficiency, as to doing the proper thing, than one acting under the same circumstances to escape being injured. It has often been said that a person is not guilty of a failure to exercise ordinary care because he fails to exercise the greatest prudence or the best judgment in a case when he is required to act suddenly or in an emergency. *Valin v. M. & N. R. Co.* 82 Wis. 1, 51 N. W. 1084.

Looking at the case at the very best for respondent, there was the brief space of five seconds, perhaps not four, from the instant the peril to deceased was apparent, till the unfortunate final event occurred. In that brief time the ordinary man of ordinary skill was called upon to comprehend the danger, to make the necessary movements, at least two in number, and for the appliances set in motion to stop the car to do their work; about the time required, going at a pretty rapid walk, to cover twenty feet. The ordinary mind, under the circumstances of this case, would require one or two seconds to act. One or two more would be required to put the appliances in operation to stop the car, leaving thus, at the most, probably not over two for the appliances to become effective. Does the law hold one guilty of actionable inadvertence if, perchance, he fails, under such circumstances, to prevent the happening of an injury? I do not think so.

The occurrence in this case, to my mind, was purely accidental. The case should have been taken from the jury, and the failure to do so should be remedied here.

There are other reasons for a reversal which I will not discuss. The evidence, to my mind, fails to prove that death was caused by the car. There is as good reason to believe that it was caused by the fall as by the collision. The right of the matter is involved in conjecture. In any event, the fright of the horse seems, very clearly, to have been the proximate cause of the unfortunate event.

WINSLOW, C. J. I concur in the above views.

CITY OF GRAND RAPIDS, Appellant, vs. BOGOGER and wife, Respondents.

January 13—February 1, 1910.

Municipal corporations: Condemnation of land for street: Confirmation of assessment: Right to appeal: Reduction of award: Acceptance: Waiver.

1. By confirming, pursuant to sec. 925—166, Stats. (1898), an assessment of damages by reason of the condemnation of land for a street, a city waives the objection that the award is excessive, and is therefore not a "party aggrieved" by such assessment, within the meaning of sec. 925—177, and cannot appeal therefrom.
2. Upon appeal by the landowner from such an assessment the award cannot be reduced, and acceptance, pending the appeal, of the amount awarded is not a waiver of the right to prosecute the appeal.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *Geo. L. Williams,* attorney, and *Glenn H. Williams,* of counsel. They cited, among other cases, *Pulling v. Columbia Co.*

3 Wis. 337; *Fiedler v. Howard,* 99 Wis. 388, 75 N. W. 163; *Sharp v. Mauston,* 92 Wis. 629, 66 N. W. 803; *Price v. Grzyll,* 133 Wis. 623, 114 N. W. 100; *Drake v. Scheunemann,* 103 Wis. 458, 79 N. W. 749.

D. I. Sicklesteel, for the respondents, cited *Alft v. Clintonville,* 126 Wis. 334, 105 N. W. 561; *Haas v. Powers,* 130 Wis. 406, 110 N. W. 205.

TIMLIN, J. The city of *Grand Rapids,* acting under secs. 925—155 and 925—171, Stats. (1898), condemned a strip of land owned by the respondents and twenty feet in width for the purpose of widening an existing street. The common council confirmed an award of damages in the sum of $4,500 in excess of benefits. The respondents, being dissatisfied, appealed from this confirmation of the award to the circuit court. Pending this appeal they accepted a city order for $4,500 tendered by the city, and surrendered up possession of the twenty-foot strip. The appeal was taken on October 15, 1908, and the tender by the appellant and acceptance of the money by respondents and the surrender of possession was on May 19, 1909, while the appeal was pending and before it came to trial.

The appellant relies on *Pulling v. Columbia Co.* 3 Wis. 337, in support of the proposition that by the acceptance of this sum respondents waived further right to prosecute the appeal. The appellant's counsel is correct in this contention if, upon the appeal pending, the circuit court could have reduced the award so confirmed below $4,500. The respondents rely on the case of *Fiedler v. Howard,* 99 Wis. 388, 75 N. W. 163, in support of their right to accept the $4,500 and prosecute their appeal for the remainder of their damages, if any. The respondents are right if the circuit court on this appeal had no power to reduce the compensation and damages of the respondents below $4,500. Whether the award could be reduced on appeal is therefore the question for consideration.

The appraisal and award is in the first instance made by

the board of public works. After a sentence of condemnation, which merely finds that it is necessary to condemn the real estate in question for public use, the common council of the city is authorized to adopt a resolution directing the board of public works to make an assessment of damages by reason of such condemnation. "When such assessment shall have been made and reported to the council that body may, by resolution, confirm the same or refer the matter back to the board for a new assessment or may, by resolution, abandon the condemnation proceeding." Sec. 925—166, Stats. (1898). The city at this stage of the proceedings exercises its right to reject the award of the board of public works if it considers that award excessive. By proceeding to confirm that award the city waives such objection. The city is therefore not a party aggrieved by an assessment of the board of public works which it has confirmed. Sec. 925—171, Stats. (1898), provides that any party aggrieved by any assessment of damages may appeal to the circuit court therefrom within the time, in the manner, and upon the security prescribed on appeals from assessment of benefits and damages on account of public improvements. The amount recovered by the appellant properly applicable in reduction of his special assessment for benefits, or the amount recovered by way of increase of damages, or for damages where none have been awarded, shall be paid by the city out of the proper fund. No provision is made for any reduction of the award of damages confirmed by the city, although it is provided that such appeal shall not affect any special tax levied on account of an excess of benefits over damages. Unless the city is a party aggrieved by an award by the board of public works which it has accepted and confirmed there is no right of appeal given to the city. This view is confirmed by the fact that the statute provides what shall be done in case of an increase of the damages, but makes no provision for the case of a reduction. In case the benefit exceeded the damages a reduction of the damages on appeal

would be unavailing unless the benefit tax could be readjusted. But the statute declares this shall not be affected by the appeal.

The only question for trial on the appeal was, therefore, what damages, if any, the plaintiff was entitled to over and above those confirmed by the city council. Under such circumstances the acceptance of the city order for $4,500, the amount of the award confirmed by the council, did not waive the right of appeal.

By the Court.—Judgment of the circuit court affirmed.

BUTTERICK PUBLISHING COMPANY, Respondent, vs. ROSE, Appellant.

January 13—February 1, 1910.

Contracts: Construction: Certainty: Implied covenants: Injunction against violation: Mutuality of remedy: Restraint of trade: Monopolies: Controlling prices: Patented articles: Adequate remedy at law: Pleading: Demurrer.

1. A contract by which plaintiff made the defendant its agent for the sale of patterns and agreed to sell and deliver patterns to him at fifty per cent. of the retail price, and defendant agreed to keep on hand patterns to a certain amount at fifty per cent. of the retail price and not to sell them except at "label prices," indicates that the retail price is stamped on each pattern and is not uncertain as to the quantity which defendant is to purchase or as to the price he is to pay therefor.
2. In such a contract there is an implied covenant on the part of plaintiff to furnish such patterns, to the amount named, as defendant may select out of plaintiff's stock.
3. There being mutuality of obligation in a contract of agency for the sale of certain goods, a covenant therein by the agent not to sell like goods of other manufacturers may be enforced by injunction, even though specific performance of the covenants of the other party could not be enforced,—mutuality of remedy not being necessary in such case.

4. The patentee of an article may sell it to whom he pleases or may refuse to sell it at all; he may by contract with purchasers from him fix the retail price at which they may sell the article, and may lawfully stipulate that sales agents appointed by him shall not sell other articles of a like character.
5. Sec. 1770*g*, Stats. (Laws of 1905, ch. 506, sec. 2), does not apply to contracts relating to the sale of a patented article.
6. State legislation restricting the rights which a patentee acquires under the constitution and laws of the United States is invalid.
7. Violation of a contract by which an agent for the sale of plaintiff's patterns agreed not to sell the patterns of any other makers may be restrained by injunction,—the remedy at law not being adequate because of the difficulty or impossibility of measuring the damages.
8. Where a complaint states a cause of action to restrain defendant from advertising and selling the patterns of other makers in violation of a contract with plaintiff, a general demurrer thereto cannot be sustained on the ground that plaintiff is indirectly endeavoring to compel defendant to perform an executory contract calling for personal services in the sale of plaintiff's patterns.

APPEAL from an order of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This action arose out of a written contract, by the terms of which the plaintiff granted to the defendant the right to act as special agent for the sale of its patterns. By the contract plaintiff agreed to sell and deliver, f. o. b. New York or Chicago, patterns at fifty per cent. of retail prices, and agreed to allow the defendant to return twice during the year, at nine tenths of the price paid for them, in exchange for new patterns to be thereafter shipped, the patterns purchased under the contract. The plaintiff further agreed to permit the sum of $150, part of the purchase price of the patterns, to stand unpaid on its books as a standing credit, to bear interest at three per cent. per annum, and to become due and payable at the termination of the agreement. In consideration thereof the defendant agreed to purchase from the plaintiff, and keep on hand for sale during the life of the contract, except for certain excepted months, patterns to the amount of $200 at

fifty per cent. of retail prices, and to allow the plaintiff to examine and take an account of the pattern stock at any time it might desire. The defendant also agreed to purchase a certain amount of advertising matter and to pay the plaintiff for patterns to be furnished it as original stock the sum of $50 in a specified manner, and to pay for other goods purchased from the plaintiff on or before the 15th day of each month succeeding the month of the purchase. The defendant agreed to keep his patterns on the ground floor and to have a lady attendant take charge of them, and further agreed not to sell or permit to be sold on his premises, during the term of the contract, any other make of patterns, and not to sell Butterick patterns except at label prices, and also agreed not to remove the pattern stock from its original location, nor assign it or the agency without the written consent of the plaintiff. It was further agreed that the contract should remain in force for three years from March 1, 1909, and from year to year thereafter, unless terminated in the manner specified.

The complaint set out the contract in full; the fact that the defendant was running a large department store at Marshfield, Wisconsin; the further fact that, pursuant to the contract, the plaintiff shipped a certain consignment of patterns to the defendant, amounting to $75.42 at fifty per cent. of the retail price, which patterns defendant refused to accept or pay for; that the defendant offered for sale another and a different stock of patterns, made by another company which was in active competition with the plaintiff; that defendant paid no attention to the sale of Butterick patterns nor to advertising the same, but on the contrary did advertise the patterns of the competing company; that before the commencement of the action the plaintiff demanded of the defendant that he withdraw from sale all patterns not manufactured by the plaintiff, which demand the defendant refused to comply with; that the defendant further asserted that he would not desist from selling patterns other than those made by the

plaintiff. Plaintiff further alleges that it will suffer irreparable loss and injury if defendant is permitted to break his contract with plaintiff, and that plaintiff will be damaged in its business if defendant sells the patterns of its competitors, and that, by reason of the breaches of the contract already committed by the defendant, plaintiff has been damaged in a large sum of money, the greater portion of the amount of such damages not being capable of ascertainment. It is further alleged that the defendant threatens to, intends to, and will, unless restrained by order of the court during the continuance of this action, continue to sell other makes of patterns in violation of his contract with the plaintiff, which acts if done will produce injury to the plaintiff.

As relief, plaintiff demanded judgment enjoining the defendant, until after the expiration of the contract, from advertising, selling, or distributing patterns, fashion sheets, catalogs, or other literature or printed matter of any pattern manufacturer other than the plaintiff, and also enjoining him from using his store, business, agents, or clerks to further or advance the interests of any pattern manufacturer other than the plaintiff, and that plaintiff recover judgment against the defendant for all damages already suffered that are ascertainable, and for such other relief as might be equitable.

The defendant demurred to the complaint on the ground that it did not state a cause of action. From an order overruling such demurrer this appeal is taken.

For the appellant the cause was submitted on the brief of *John F. Cole,* attorney, and *Geo. L. Williams,* of counsel.

For the respondent there was a brief by *Sturdevant & Farr,* and oral argument by *L. M. Sturdevant.*

BARNES, J. 1. The appellant contends that the contract sued on is void because of uncertainty as to the quantity which he should purchase and the price which he should pay for the goods bought thereunder. This court cannot say as a matter

of law that the retail price of the articles covered by the contract is not a matter that can be definitely ascertained. The contract provides that the patterns shall not be sold by defendant except at "label prices," which would indicate that there was stamped on each pattern the retail price at which it should be sold. Defendant is required to keep on hand patterns to the amount of $200 at fifty per cent. of the retail prices. There is no indefiniteness about this provision where each pattern has the retail price marked thereon. The defendant having obligated himself to buy patterns to this amount, there is an implied covenant on plaintiff's part that it will furnish such goods to that amount as defendant may see fit to select out of plaintiff's stock. *Manning v. Galland-Henning P. M. D. Mfg. Co., ante,* p. 199, 124 N. W. 291, and cases cited therein.

2. Appellant next contends that the contract is void for want of mutuality. In support of such claim it is urged that the plaintiff is seeking by injunction to enforce the negative covenant in the contract not to sell the goods of other manufacturers, that specific performance could not be enforced by defendant should plaintiff refuse to perform, and that unless there is mutuality of remedy as well as of obligation equity will not interfere. It has already been said that there is mutuality of obligation under this contract. It is not necessary that there should also be mutuality of remedy in order to enable the plaintiff to enforce such a negative covenant as is found in the contract sued on. It is so held in a case involving the same contract as is here involved, except that the purchaser was different. *Butterick P. Co. v. Fisher,* 203 Mass. 122, 89 N. E. 189. And in reference to contracts identical in form with the one sued on. *Standard F. Co. v. Ostrom,* 16 App. Div. 220, 44 N. Y. Supp. 666, and *Standard F. Co. v. Siegel-Cooper Co.* 30 App. Div. 564, 52 N. Y. Supp. 433, affirmed on appeal, 157 N. Y. 60, 51 N. E. 408. And in reference to contracts involving the same principle. *Ropes*

v. Upton, 125 Mass. 258; *W. U. Tel. Co. v. Rogers,* 42 N. J. Eq. 311, 11 Atl. 13; *Myers v. Steel M. Co.* 67 N. J. Eq. 300, 57 Atl. 1080; *Ferris v. American B. Co.* 155 Ind. 539, 58 N. E. 701; *Waldorf-Astoria S. Co. v. Salomon,* 109 App. Div. 65, 95 N. Y. Supp. 1053, affirmed 184 N. Y. 584, 77 N. E. 1197; *Southern F. B. & C. Co. v. Garden City S. Co.* 223 Ill. 616, 79 N. E. 313; *General E. Co. v. Westinghouse E. Co.* 151 Fed. 664; *Catt v. Tourle,* 4 Ch. App. Cas. 654; 1 Joyce, Injunctions (1909), § 457.

3. It is next contended that the contract is in restraint of trade and that it therefore violates the provisions of sec. 1770*g,* Stats. (Laws of 1905, ch. 506, sec. 2), and is void. While, under the patent laws, a patent creates a monopoly, it is not a monopoly of what existed before and belonged to others, which is the true idea of a monopoly, but it is a monopoly of what did not exist before and what belongs to the patentee. In consequence it does not create an odious monopoly, and the rights of patentees thereunder are to be liberally construed. 30 Cyc. 816, and cases cited. The patentee of an article may sell it to whom he pleases or may refuse to sell it at all. He may stipulate the retail price at which the purchaser from him may sell the article, and may lawfully obligate a special agent appointed by him to sell his article to the exclusion of other articles of a like character. *Edison P. Co. v. Kaufmann,* 105 Fed. 960; *Edison P. Co. v. Pike,* 116 Fed. 863; *National P. Co. v. Schlegel,* 117 Fed. 624; *Victor T. M. Co. v. The Fair,* 123 Fed. 424. We do not think that the legislature intended to extend the provisions of sec. 1770*g* to contracts made in reference to the sale of a patented article. If it did attempt to restrict the rights which a patentee acquires under the constitution and laws of the United States, the legislation could not be upheld. *United States C. S. R. Co. v. Griffin & S. Co.* 126 Fed. 364; *Bement v. Nat. H. Co.* 186 U. S. 70, 22 Sup. Ct. 747. The constitution and all laws made in pursuance thereof constitute the supreme law of

the land. Art. VI, Const. of U. S. Congress is empowered by the constitution to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries. Sec. 8, art. I, Const. of U. S. This state could pass no law which materially abridged any right conferred on an inventor by a federal law passed in pursuance of the power above granted.

4. It is next urged upon us that the action is not maintainable because the plaintiff has an adequate remedy by an action at law to recover the damages sustained by reason of the breach of the contract. From a practical standpoint it would be impossible to measure the damage which plaintiff might sustain by reason of the defendant advertising patterns made by a rival company that was a competitor of plaintiff. So, too, the loss which plaintiff might sustain by reason of the defendant selling other makes of patterns would be most difficult of ascertainment, if it could be shown at all with sufficient certainty to be made the basis of a claim for damages. The objection that there is an adequate remedy at law will not defeat a suit in equity, unless the legal remedy is as adequate, comprehensive, and effectual as that afforded by a court of equity. *Lawson v. Menasha W. Co.* 59 Wis. 393, 397, 18 N. W. 440. An injury will be enjoined as irreparable if its nature be such that it cannot be adequately compensated in damages or cannot be measured by any certain pecuniary standard. *Wilson v. Mineral Point,* 39 Wis. 160, 164; *Eau Claire W. Co. v. Eau Claire,* 127 Wis. 154, 159, 106 N. W. 679.

5. Lastly it is argued that the real remedy sought to be enforced amounts to an attempt to compel the defendant, by indirection, to perform an executory contract calling for personal services, and the case of *Chain B. Co. v. Von Spreckelsen,* 117 Wis. 106, 94 N. W. 78, is cited to show that such an action will not lie. This court is called upon to say whether

or not a cause of action is stated in the complaint. It does state facts which entitle plaintiff to relief by injunction restraining the defendant from advertising or selling other makes of patterns while its contract with plaintiff is in force. A cause of action being stated, we cannot reverse the order because the plaintiff may, by indirection or otherwise, seek some relief to which it is not entitled, nor assume that the trial court will finally grant improper relief.

By the Court.—Order affirmed.

McCABE, Appellant, vs. JONES, Respondent.

January 13—February 1, 1910.

Real-estate brokers: Commissions: When purchaser is "pecuniarily able" to buy: Obtaining money by contemporaneous mortgage.

1. To entitle a real-estate broker to recover his commission on a sale which his principal refused to carry out he need show only that he procured a purchaser who was ready, willing, and pecuniarily able, within the time fixed, to take and pay for the property.
2. "Pecuniarily able" in such connection means merely able to command the necessary money to close the deal on reasonable notice or within the time limited by the vendor.
3. A proposed purchaser is pecuniarily able to complete the purchase if he has so arranged that the money will be forthcoming at the moment the deed is passed to him, although a part of such money is to come from one who at the same moment receives a mortgage from such purchaser. *McCune v. Badger*, 126 Wis. 186, distinguished.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action by real-estate broker to recover commissions for negotiating a sale of the defendant's farm to one Leach. The case was tried before a jury and a special verdict rendered, by which it was found: (1) That the parties agreed that if plaint-

iff would induce Leach to purchase defendant's farm and personal property at the price of $13,000, and pay therefor $7,000 in cash and convey by good title Leach's residence property in Oshkosh free of incumbrance, defendant would sell at that price and would pay plaintiff $250. (2) That before defendant's offer was withdrawn Leach was ready, able, and willing to pay defendant $7,000 in cash and convey a perfect, unincumbered title to his residence property in Oshkosh in exchange for defendant's farm and personal property, and defendant was so notified. It was admitted that the plaintiff procured the offer from Leach. On motion the court changed the second answer from "yes" to "no," and entered judgment on the verdict for defendant, and the plaintiff appeals.

For the appellant there was a brief by *Eaton & Eaton,* and oral argument by *M. H. Eaton.*

John C. Hart, for the respondent.

WINSLOW, C. J. The trial judge reversed the answer to the second question because in his judgment the evidence was conclusive that Leach was not ready, able, and willing to make the trade, and the only question in the case is whether this ruling is correct.

The evidence on this question was substantially as follows: Leach's homestead in Oshkosh was subject to a mortgage of $2,000. Leach testified that he owned $10,000 worth of unincumbered property in Oshkosh outside of his homestead; that he arranged with one Elmer Clark to let him have $7,000 upon mortgage on the *Jones* farm at the time the papers should be exchanged; that he had also provided to turn over his homestead clear of incumbrance; that these arrangements were complete before and at the time when the trade was to be completed. Clark testified that in accordance with Leach's request he had the $7,000 ready in hand to loan to Leach on the *Jones* farm and kept the money ready for two months. It was admitted that Leach notified *Jones* of

his readiness to carry out the arrangement. There was no evidence to contradict this testimony of Leach and Clark, nor was there any evidence tending to throw doubt upon their good faith or upon the ability of either of them to carry out the arrangements which they testified they were ready and willing to carry out.

It seems probable that the trial court reversed the jury's finding upon the authority of *McCune v. Badger,* 126 Wis. 186, 105 N. W. 667, deeming it to have been decided in that case that where a purchaser expects to raise a part of the purchase price by mortgaging the purchased premises he cannot be said to have been able, ready, and willing to complete the trade. We do not understand this to be the effect of that case. True, the purchaser in that case claimed that he expected to raise nearly all of the purchase money by mortgaging the purchased property, and this fact was mentioned in the discussion of the case; but the decision went upon the broad ground that the purchaser was not shown to be ever in circumstances where he could take the property and pay for it. He was to pay $9,000, and he did not pretend to have more than $2,000. There was loose testimony that some persons had promised to loan $7,000 on the purchased property (a fact which seems intrinsically very doubtful), but nothing to show that these persons were on hand at the time the deal was to be closed or ever had been on hand. Under these circumstances the decision of the trial court that the evidence was insufficient to carry the question of ability and readiness to the jury was sustained under the rule of deference owing to a decision of the trial court upon such a question.

It is a matter of common knowledge that very many, if not a majority of, contracts for the purchase and sale of real estate are expected to be carried out by obtaining a part of the purchase money on a mortgage of the property itself, to be executed contemporaneously with the execution of the deed. If the purchaser has his arrangement made so that the money

will be forthcoming at the moment the deed is passed to him, no reason is perceived why he may not truly be said to be ready, able, and willing to complete the deal, although a part of the money comes from one who at the same moment receives a mortgage of the newly purchased premises.

Where a real-estate broker sues for his commissions on a sale which his principal refuses to carry out, he cannot, of course, prove his case by showing that he produced a straw bidder, but on the other hand he is not required to show that he brought a man with the cash all in hand in legal tender. He is simply required to show that he procured a purchaser who was ready, willing, and pecuniarily able within the time fixed to take and pay for the property. Mechem, Agency, § 966. "Pecuniarily able," in this connection, must of course have a reasonable construction. It cannot mean that the proposed purchaser must necessarily have all the money in his pocketbook or to his credit at the bank, but that he is able to command the necessary money to close the deal on reasonable notice, or within the time limited by the vendor, if a time be limited.

We think the evidence here was sufficient to entitle the jury to find as they did that Leach was "able" to make the purchase within the meaning attached to that word in the ordinary course of such transactions.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the plaintiff upon the verdict.

CARPENTER, Appellant, vs. CARPENTER, imp., Respondent.

January 13—February 1, 1910.

Chattel mortgages: Delivery: Escrow: Conditions.

1. Mere manual tradition of an instrument to one as a custodian thereof for both the maker and obligee, under a mutual agreement not to give present validity to the paper, is not a delivery.
2. A note and chattel mortgage from a son to his mother were deposited in a bank in escrow, together with a writing expressing the condition that they should not take effect or be enforceable unless the mother should survive the son. Afterwards the son was divorced, his wife being awarded the mortgaged property subject to the mortgage, but without any purpose of altering the agreement under which the securities were deposited. At the request of both the son and the mother, but without consent of the former wife, the papers were delivered by the bank to the son and by him placed on file. *Held*, that the mortgage did not thereby become effective as against the former wife.

APPEAL from a judgment of the circuit court for Waupaca county: A. H. REID, Judge. *Affirmed.*

Action to foreclose a chattel mortgage.

The issues raised by the pleadings are fairly shown by the following summary of the decision of the case as to facts:

October 8, 1902, defendants, who were then husband and wife, gave plaintiff,—an elderly lady and mother of defendant Willard E. Carpenter and two daughters, Willard being the youngest child and some thirty-seven years of age,—a mortgage on a newspaper plant, purporting to secure payment of Willard's promissory note for $3,000 to his mother according to the terms of such note. The mortgage was duly filed and kept alive. No part of the mortgage indebtedness has been paid. The security on its face had fully matured when this action was commenced. Prior to execution of the note, plaintiff had, as she supposed, given her daughters their just shares of her estate, and considered her son to be entitled to all that might be left at her decease. She was then, and has

continued to be, a frail woman, needing the care of some younger person or persons. She had for some time prior to the making of the mortgage, resided with the defendant, and so continued until the summer of 1904. Prior to giving the mortgage plaintiff had made gifts out of her property to her son, aggregating $3,000 or more. The mortgage and note described therein were executed and deposited in escrow with the cashier of a national bank at Waupaca, Wisconsin, upon condition, expressed in a writing executed and likewise deposited, that if Willard Carpenter should predecease plaintiff, and not otherwise, the papers should take effect and be enforceable for her benefit, and that they should not be taken out of escrow till the death of either plaintiff or Willard, and in case of the death of the former occurring first they should be delivered to the mortgagor. The relations of debtor and creditor were not regarded as existing between the plaintiff and her son as a foundation for the note and mortgage. At the time of the execution of the papers she was living with defendant and, for aught that appeared, expected to do so for life. The securities were executed for her protection in case she should survive Willard and for no other purpose. July 29, 1904, defendants were divorced, the mortgaged property being awarded to the wife subject to the mortgage. The note and mortgage, then in escrow, were examined by her attorney and in the division she was awarded the mortgaged property without any purpose of interfering with the agreement pursuant to which the securities were executed. Thereafter Willard obtained from his mother a written request for the custodian of the papers to deliver them to him by means of which he obtained them and placed the mortgage on file, since which time they have been under control of Willard and others for plaintiff and himself. Defendant *Aneta R. Carpenter* never consented to withdrawal of the papers from escrow or to any change of her interest in the contingently mortgaged property.

On such facts the court decided that the mortgage could only take effect upon the death of Willard E. Carpenter in the lifetime of plaintiff; that the agreement in that regard, made when the papers were placed in escrow, was in no way changed by the division of property in the divorce proceedings, and that defendant *Aneta R. Carpenter* was entitled to judgment dismissing the action with costs against plaintiff. Judgment was so rendered.

F. F. Wheeler, for the appellant.

For the respondent, *Aneta R. Carpenter,* there was a brief by *John C. Hart,* attorney, and *B. R. Goggins,* of counsel, and oral argument by *Mr. Hart.*

MARSHALL, J. It is considered that the findings of fact are protected by the principle that they cannot be disturbed unless they are against the clear preponderance of the evidence.

The foregoing conclusion leaves as verities, that the note and mortgage were executed and placed in escrow to take effect according to their terms only upon the happening of an event which had not transpired when this action was commenced to enforce them; that *Aneta R. Carpenter* became the owner of the property described therein subject to that situation and that the papers were in form taken out of escrow without her consent by appellant and her son.

The verities suggested are ruled by the familiar principle of law that, in the absence of some efficient element of estoppel, and none exists or is claimed to exist here, if an instrument is delivered by the maker to the obligee, or to another for him, or as custodian for both, accompanied by an agreement, verbal or in writing, that it shall not take effect till some specified event shall have occurred, it will have no validity till the condition shall have been satisfied; but remain in the meantime the same to all intents and purposes as if it had never left the possession of the maker. Mere manual

tradition of such a paper is one thing, delivery thereof as an element of a contractual obligation is another. The former without mutual intent to give validity to the paper, but a mutual intent to the contrary, does not constitute the latter. *Nutting v. Minnesota F. Ins. Co.* 98 Wis. 26, 73 N. W. 432; *Thorne v. Ætna Ins. Co.* 102 Wis. 593, 78 N. W. 920; *State ex rel. Jones v. Chamber of Comm.* 121 Wis. 110, 98 N. W. 930; *Golden v. Meier,* 129 Wis. 14, 107 N. W. 27; *Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192; *Marling v. FitzGerald,* 138 Wis. 93, 120 N. W. 388; *Swanke v. Herdeman,* 138 Wis. 654, 120 N. W. 414.

By the Court.—Judgment affirmed.

OLIGNY and another, Appellants, vs. CITY OF NEW RICHMOND and others, Respondents.

January 14—February 1, 1910.

Intoxicating liquors: Local option: Threatened refusal of license: Action to set aside election.

A threatened refusal by city officers, pursuant to the result of a local option election, to grant to a liquor dealer a license for the coming year—the time for issuance of such licenses not having arrived,—does not affect any existing private right and does not entitle such dealer to maintain an action to set aside the election.

APPEAL from an order of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Affirmed.*

This is an action to set aside the election held in the city of *New Richmond* on the first Tuesday of April, 1909, on the question whether or not any person should be licensed to deal or traffic in any spirituous, malt, or intoxicating liquors or drinks as a beverage. The complaint alleges that each year from 1900 to 1908, inclusive, this question was legally sub-

mitted to the electors of the city, that at each of such elections the majority of the votes cast was in favor of license, and that licenses were duly granted for the sale of such liquors in each of these years. It is alleged that in 1909 an election was held pursuant to a petition of fifty qualified electors of the city, but that the election should be held void for defects in the petition, in that it lacked a date, and for other slight irregularities, and because nine electors of the city who would have voted for license and thus have changed the result of the election were prevented from voting because they relied upon the city clerk's notice of the election stating that the polls would be held open until 6 o'clock in the afternoon, whereas in fact they were closed at 5 o'clock. It is alleged that the plaintiff *H. C. Hanson* has for seven prior years been engaged in the retail liquor business in the city of *New Richmond,* and that unless he can procure a license to continue the business the good will of his business will be destroyed and his buildings, stock, and fixtures used in the conduct of the business will be greatly depreciated in value. The complaint alleges that if the election be set aside the common council of the city will grant the plaintiff *H. C. Hanson* a license to sell intoxicating liquors. The city, the mayor, the city clerk, and the aldermen of the city are made parties defendant.

This is an appeal from the order of the court sustaining the demurrer of the defendants on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendants.

The cause was submitted for the appellants on the brief of *W. F. McNally* and *W. T. Doar,* and for the respondents on that of *Baker & Haven* and *George Oakes.*

SIEBECKER, J. The foregoing statement shows that the plaintiff *Hanson* assails the validity of the special election, and alleges that if it be held valid it will cause him private injury, in that the city officers will not grant him a license to sell intoxicating liquors for the ensuing year, thereby de-

stroying the good will of his business and greatly depreciating the value of his buildings, stock, and fixtures, heretofore devoted to the prosecution of his licensed business in intoxicating liquors. The threatened action of the city officers does not in legal contemplation take from the plaintiff or destroy any of his vested property rights. By sec. 1548, Stats. (1898), the common council of the city may grant licenses permitting the sale of intoxicating liquors to such persons as they may deem proper to conduct such a business within the city. The allegations of the complaint charge no violation of an existing license, and are wholly directed to the effect of the threatened refusal to grant *Hanson* a license to do this business. However, the time for the issuance of licenses had not arrived when the action was commenced, and no steps for their issuance had been taken by either the plaintiffs or the city. Under such circumstances the threatened acts do not affect any vested rights. No person has in law a right to engage in this traffic unless a license has been obtained therefor under the conditions and upon the terms prescribed by the statutes. *State v. Downer,* 21 Wis. 274, and subsequent cases. It therefore follows that under the facts alleged no existing rights of the plaintiff are invaded by the threatened refusal of the city officers to license him to conduct this business, and hence plaintiff fails to allege any grounds tending to show an injury to a private right. The case is therefore ruled by the principle which was applied in *Nast v. Eden,* 89 Wis. 610, 62 N. W. 409. It is there declared:

"Equity does not revise, control, or correct the action of municipal officers at the suit of a private person, 'except as incidental and subsidiary to the protection of some private right or the prevention of some private wrong, and then only when the case falls within some well-defined head of equity jurisprudence.' "

It is insisted that *State v. Robbins,* 54 N. J. Law, 566, 25 Atl. 471, is a case in point. There an innkeeper prosecuted a writ of *certiorari* to determine the legality of a proceeding

under the statute for the ordering and holding of an election to determine what fee should be charged for a license to keep an inn. The case as reported apparently went on the assumption that the prosecutor's rights to keep his inn were threatened with invasion to his injury by the proposed illegal election proceeding under the law of that state. We do not regard the case as applicable to the situation presented in the instant case, and, in so far as the reasoning of the case implies that a threatened refusal to grant a license to sell intoxicating liquors results in a private injury to a prospective applicant for a license to conduct such a business, it is contrary to the law as established in this state, and we must refuse to follow it.

We are of the opinion that the trial court properly sustained the demurrer to the complaint upon the ground that the complaint fails to state a cause of action.

By the Court.—The order appealed from is affirmed.

HANSON, Respondent, vs. JOHNSON, Appellant.

January 14—February 1, 1910.

Breach of promise: Damages: Seduction: Instructions to jury: Special verdict: Evidence: Precedents: Curing errors: Immaterial errors: Reducing award.

1. In an action for breach of promise of marriage, where seduction was pleaded in aggravation of damages, a charge to the jury that the only bearing the evidence as to seduction had in the case was to enhance the damages, if any, from such breach of promise, and that in order to find that plaintiff was seduced by defendant the jury must find from a preponderance of the evidence that she had no intercourse with defendant prior to such promise and that she consented to such intercourse solely by reason of such promise, if they found such a promise was made,—presented the question to the jury in a manner sufficiently favorable to the defendant.

2. It is not error to refuse to submit in a special verdict a question as to which there is no evidence which would warrant an answer favorable to the party requesting such submission.
3. The evidence in this case (consisting of the testimony of the parties) would not have warranted the jury in finding that the parties had sexual intercourse prior to any promise of marriage between them.
4. Precedents for the exclusion of evidence must be read, not only with reference to the issues made by the pleadings in the particular case, but also with reference to the other evidence in such case.
5. In an action for breach of promise, where evidence that a child was born as a result of intercourse came into the case inadvertently, and afterwards letters which were otherwise competent referred to the child, an instruction to the jury to disregard this fact in assessing damages cured the error, if any, in the admission of such evidence.
6. Error in admitting evidence is cured by a direction to the jury to disregard it, unless it appears that notwithstanding such direction the appellant was prejudiced by the error.
7. In an action for breach of promise, evidence as to the length of time the marriage engagement lasted and the number of years plaintiff waited for defendant to marry her, and as to the degree of intimacy between them, is competent upon the question of damages.
8. Evidence as to the wealth of defendant, including testimony as to the amount of the monthly sales in his saloon, was competent in such a case.
9. Admission in evidence, among the presents given by defendant to plaintiff, of a button bearing the photograph of a child which had been referred to as the result of intercourse between the parties, was an immaterial error, the photograph not being offered for the purpose of proving resemblance.
10. An award of $8,000 as damages for breach of a marriage promise was not excessive under the evidence in this case.
11. The supreme court will encourage the trial judges to exercise their judgment in cutting down excessive verdicts, and so far as possible will sustain the estimate of such a judge where he has reduced an award to the amount which in his judgment is proper.

APPEAL from a judgment of the circuit court for Pierce county: E. W. HELMS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Thos. M. Casey* and *White & Skogmo,* and oral argument by *F. M. White.*

For the respondent there was a brief by *George Thompson,* attorney, and *Arctander, Johnson & Berg,* of counsel, and oral argument by *J. N. Berg.*

TIMLIN, J. The plaintiff in this action for breach of promise of marriage pleaded in aggravation of damages her seduction by defendant under such promise. This was met by a general denial. According to the testimony of the plaintiff she became acquainted with the defendant in the year 1895, and soon thereafter there was a marriage engagement entered into between them, and, relying upon this engagement, at the solicitation of defendant she yielded to sexual intercourse, which continued thereafter for thirteen or fourteen years, when defendant breached his promise to marry. Defendant admitted this intercourse, but testified that there never was at any time a promise of marriage. There was a special verdict, complete in other respects, but which contained no finding covering the fact of seduction. The defendant requested that the court submit to the jury the following question: "Did plaintiff and defendant have sexual intercourse with each other prior to any promise of marriage between them?" The court refused to submit this question, and charged the jury concerning this matter as follows:

"The only bearing such evidence has in this case is to enhance the damages, if any, arising from such breach of promise to marry." "In order to find that plaintiff was seduced by defendant, you must find from a preponderance of the evidence that said plaintiff had no intercourse with the defendant prior to the time of such promise of marriage, and that she consented to such act of intercourse solely by reason of such promise of marriage, and that she would not have consented to and had intercourse with the defendant if it had not been for such promise of marriage, if you find such was made at the time of such act of intercourse."

While not literally accurate, this instruction presented the question to the jury in a manner sufficiently favorable to the

appellant, if we regard merely the instruction. It has been ruled by this court that where an issuable material fact is averred in the complaint and controverted by the answer, a defendant who has by compliance with the statute entitled himself to a special verdict may insist upon a question in the special verdict calling for a finding upon such fact if he made proper and timely request therefor (*Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865; *Bredlau v. York,* 115 Wis. 554, 92 N. W. 261), but not then if there is no evidence to support the finding so requested (*Reed v. Madison,* 85 Wis. 667, 56 N. W. 182); nor where there is a mere scintilla of evidence with overwhelming evidence to the contrary (*Hogan v. Cushing,* 49 Wis. 169, 5 N. W. 490). Assuming, for the purposes of this discussion, that in the instant case defendant was otherwise entitled to have this question submitted to the jury, there is, we think, no evidence which would support an answer to such question favorable to appellant. The evidence on this point is confined to the testimony of plaintiff and defendant.

Plaintiff testifies that she first became acquainted with the defendant in March or April, 1895, at a boarding house where he was a boarder and she a servant, and that she saw him every day, and that he was accustomed to come upstairs where she was at work. At an interview upstairs at the boarding house and two or three months after their first acquaintance the engagement of marriage took place, and she had more than one conversation with the defendant concerning marriage before his visit to Dakota, which is definitely fixed as August, 1895. She testifies that the first act of sexual intercourse took place quite a while after this engagement. The defendant met this by his testimony, which closely follows that of plaintiff as to time. He first met her at this boarding house in the spring of 1895. He had seen her "a month or so" before he "first went out with her." The first time he went out with her was in June, 1895. The

second time he went out with her there was sexual intercourse. There was never at any time any promise of marriage. It will be observed that he does not fix the time of this first act of sexual intercourse, except that it was after some day in June, 1895, and that it was the second time he went out with her. His version of the occurrence is that there never was at any time a promise of marriage. The plaintiff charged him by her testimony with a promise made at the boarding house before this first act of intercourse. In order to find a promise of marriage (and this question was submitted to the jury) the jury must believe the plaintiff. The requested question assumes that there had been a promise of marriage. Would it not be the merest guess on the part of the jury to say from the foregoing evidence of defendant and against the positive evidence of plaintiff that there was a promise of marriage, but that the first act of sexual intercourse antedated this promise? Upon what could such finding rest? The defendant does not give any date or fix any time for the act nor any date from which the jury could compute time, except it was after a day in June. We think there was no sufficient evidence to warrant the submission of the question as proposed to the jury. At least it can be said that the appellant was not prejudiced by the refusal of this question, for it is highly improbable that any tribunal for the trial of questions of fact would have answered the question in his favor upon the evidence in this case, and the court fully instructed the jury concerning the legal effect of the fact of seduction, and the necessity of being convinced that such seduction was in fact accomplished as hereinbefore quoted.

Seventeen errors are assigned upon the admission of evidence. We cannot undertake to notice them all in detail. Precedents for the exclusion of evidence must be read, not only with reference to the issues made by the pleadings in the particular case, but also with reference to the other evidence in such case. It is easy to be misled by them or to magnify

their generality as legal rules. Most of such errors here assigned are technical and unsubstantial.

Error is, however, assigned because evidence was admitted that a child was born to the plaintiff as a result of the intercourse mentioned. The weight of judicial authority and the natural logic of the situation seem to justify the admission of such evidence. *Musselman v. Barker,* 26 Neb. 737, 42 N. W. 759; *Giese v. Schultz,* 65 Wis. 487, 27 N. W. 353; *Stewart v. Anderson,* 111 Iowa, 329, 82 N. W. 770; 3 Suth. Dam. (3d ed.) § 985. But it is not necessary to pass on this question in the instant case, and the plaintiff was perhaps precluded from such proof because she had not pleaded this fact in aggravation of the usual and ordinary damages flowing from a breach of the promise of marriage. The evidence of the existence of this child came into the case quite inadvertently, and afterward in connection with letters from defendant to plaintiff, which letters were otherwise competent evidence, but also referred to the child, and the trial court instructed the jury to disregard this fact in their assessment of damages. The appellant contends that this direction of the court did not cure the error of admitting the evidence in question, and cites *Dr. Harter M. Co. v. Hopkins,* 83 Wis. 309, 53 N. W. 501, and *Johannesson v. Borschenius,* 35 Wis. 131, while the respondent relies on *Rooney v. Milwaukee C. Co.* 65 Wis. 397, 27 N. W. 24; *Waterman v. C. & A. R. Co.* 82 Wis. 613, 52 N. W. 247, 1136; *Beggs v. C., W. & M. R. Co.* 75 Wis. 444, 44 N. W. 633; and also *Pennsylvania Co. v. Roy,* 102 U. S. 451, and Jones, Ev. § 895 (898) and cases cited. The rule of this court on this subject, differing somewhat in this regard from other courts, is to the effect that such direction of the trial court will cure an error in the admission of evidence, except in such cases where all the evidence is before this court and the court is satisfied from an examination of the same that the appellant was prejudiced by the erroneous admission of the evidence notwithstanding the in-

struction mentioned. Cases *supra* and *Radichel v. Kendall,* 121 Wis. 560, 99 N. W. 348. In the case at bar this was the proper disposition to make of the evidence, because the fact could not be wholly excluded from the jury and at the same time give the plaintiff the benefit of all her evidence otherwise competent in the case, notably defendant's letter of July 25, 1899.

The length of time that this marriage engagement lasted and the number of years that plaintiff waited for defendant to marry her were proper items of evidence bearing upon the amount of plaintiff's damages, and it would be a rather illogical and technical rule which would exclude the degree of intimacy between the parties which existed during this fourteen years. We think the latter was competent and proper evidence.

The testimony relating to the wealth of the defendant was also competent. *Salchert v. Reinig,* 135 Wis. 194, 115 N. W. 132. The amount of the monthly sales of his saloon was an item bearing upon this question also competent. Plaintiff's counsel, in offering proof that the defendant made presents to the plaintiff, offered with such oral proof a ring. a watch, and a photographic button, all of which were produced and offered in evidence. The photograph on this button was that of the child in question. There may have been some legal skill exercised in grouping this present, insignificant in intrinsic value, with the others, but it was not offered for the purpose of proving resemblance, and the fact that the photograph of this particular child was on the button would not alone render it incompetent. This court does not reverse judgments for such trifles.

We find no error in refusing to submit the other questions of the special verdict requested by defendant, nor in the instructions of the court to the jury.

The jury rendered a verdict of $10,000 damages, which the court reduced to $8,000. It is contended in this court

that the damages are still excessive. We do not so view the evidence. The affair between plaintiff and defendant covered a period of about fourteen years, including all that part of her life when her chances for an advantageous marriage were best. The matter in aggravation was very serious, and the defendant appears to be of ability to respond in considerable damages. Damages in such cases are very difficult to estimate, and ordinarily the proper tribunal for that purpose is the jury. Besides, it is the rule of this court to encourage the circuit judges to exercise their judgment in cutting down excessive verdicts; and in order to give effect to that rule, which we believe founded in legal principles, we must, as far as possible, sustain the estimate of the circuit judge where he has actually passed on the question and reduced the verdict to such amount as in his judgment is proper. We find no reversible error in the record, and the judgment must be affirmed.

By the Court.—Judgment affirmed.

STATE, Respondent, vs. COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, Appellant.

January 14—February 1, 1910.

Statutes: Penalties: Construction: Life insurance companies: Withdrawal from state: Annual reports: "Doing business" in this state.

1. In construing a statute, effect must be given if possible to every word, clause, and sentence thereof.
2. The rule that a criminal statute should not be so construed as to multiply offenses where such a construction can reasonably be avoided, is equally applicable to statutes imposing pecuniary penalties.
3. Statutes imposing penalties must be strictly construed, and will not be extended by implication. Doubtful questions thereunder are to be resolved favorably to those from whom the penalties are sought to be recovered.

4. A life insurance company which had surrendered its license and attempted to withdraw from the state, maintaining no agents and writing no new insurance here, and doing, through correspondence, only those acts which were necessary to fulfil its obligations under outstanding contracts with policy-holders residing in the state, was doing business in this state so as to be subject to reasonable regulation for the benefit of its resident policy-holders. *Chicago T. & T. Co. v. Bashford*, 120 Wis. 281, distinguished.
5. Such company is not, however, "doing business in this state" within the meaning of sec. 1954, Stats. (Laws of 1907, ch. 597), requiring the filing of the annual statement therein prescribed. The words "doing business" in that section mean doing such business as is usually carried on by corporations regularly licensed to transact business in this state.
6. The penalty imposed by sec. 1954 for failure to file the annual statement therein prescribed is not applicable to a failure to comply with sec. 1953*n*, Stats. (Laws of 1907, ch. 584), which provides that every life insurance company doing business in this state, "or having in force any policies issued or delivered therein," shall furnish the report required by sec. 1954 and certain other additional information.
[7. Whether secs. 1953*n* and 1955*o*—5, Stats. (Laws of 1907, ch. 584 and ch. 483), are valid, not determined.]
8. TIMLIN, J., is of the opinion that a foreign corporation which has withdrawn from the state except for the purpose of service of process to enforce its former contracts, cannot be made subject to a penal law of this state for failure to file annual reports.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This action was brought to recover a penalty. Prior to December 31, 1907, the defendant had been licensed to transact and did transact a general life insurance business in the state of Wisconsin, and on the last-named date had 283 policies of insurance outstanding and in force in the state. The defendant on that date surrendered its license and withdrew, or attempted to withdraw, from the state of Wisconsin and cease doing business therein. After December 31, 1907, no agent or officer of the defendant resided within the state and no new business was written. The defendant refused to file, on March 1, 1908, the report required by sec. 1954, Stats.

(1898), as amended by ch. 597, Laws of 1907, and also refused to file the report required by sec. 1953*n*, Stats., being ch. 584, Laws of 1907. The complaint averred that such report was not filed within the time required nor within one month thereafter, and prayed for damages in the sum of $1,000. From a judgment awarding such damages this appeal is taken.

For the appellant there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and a separate brief by *Frederick H. Nash,* of counsel; and the cause was argued orally by *Mr. Jackson B. Kemper* and *Mr. Nash.*

For the respondent there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, and oral argument by *Mr. Jackson.*

BARNES, J. Ch. 584, Laws of 1907 (sec. 1953*n*, Stats.), reads as follows:

"Every life insurance company doing business in this state, or having in force any policies issued or delivered therein, shall annually furnish the report required by sec. 1954 and with such report separately for its participating and nonparticipating business and its ordinary and industrial business a statement exhibiting the gains and losses separately for the first year's business and for the total business of the company upon blanks prepared by the commissioner in substantially the form heretofore required. Where a separate account of any items required on such statement shall not be kept as to the participating and nonparticipating or ordinary and industrial business of any company, such statement shall state what proportion of such items is apportioned to each kind of such business. Such company shall also furnish such other information in regard to said matters as the commissioner of insurance may require."

Sec. 1954, Stats. (1898), as amended by ch. 237, Laws of 1903, and ch. 597, Laws of 1907, requires every life insurance company doing business in Wisconsin to file, on or be-

fore March 1st in each year, in the office of the insurance commissioner, an annual statement giving a complete and accurate account of its business and financial condition, verified in a manner prescribed, and covering the year ending on the preceding 31st day of December. The statute then enumerates the items of information that must be embodied in the statement, being thirty-four in number. For failure to file such report by March 1st in each year a penalty of $500 is provided, and for failure to file thereafter a further penalty of $500 per month is imposed while such company shall have any policy in force in this state, until the statement is filed. Prior to the time ch. 597, Laws of 1907, went into effect, the cumulative penalty was effective for every month the insurance corporation continued to transact business in the state until the statement was filed. Ch. 597, Laws of 1907, became effective on the same day as ch. 584.

Ch. 483, Laws of 1907 (sec. 1955*o*—5, Stats.), reads:

"Any corporation violating any of the provisions of the laws of this state relating to insurance shall, where no other penalty is prescribed, be punished by a fine of not more than five thousand dollars and any person violating any of the provisions of the laws of this state relating to insurance shall, where no other penalty is prescribed, be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

It will be observed that the report required by sec. 1954 must be made by companies doing business within the state, and that the report required by sec. 1953*n* must be made by companies doing business within the state, *or having in force any policies issued or delivered therein.*

It will be further observed that sec. 1953*n* prescribes no penalty for its violation, and that sec. 1955*o*—5, which became effective on the same day, provides that any corporation violating any laws of the state relative to insurance, where no other penalty is prescribed, shall be punished by a fine not

exceeding $5,000, and that any person violating such laws may be punished by fine or imprisonment, or both.

It is contended by the state that the defendant violated the provisions of secs. 1953*n* and 1954, Stats. (Laws of 1907, ch. 584 and ch. 597), and that the penalty provided for in sec. 1954 is not only applicable to the latter statute, but also to a violation of sec. 1953*n*, and that both statutes are valid laws.

The defendant, on the contrary, urges that sec. 1954 has no application to it because it is not doing business in the state, and was not at the time it was required to file a report under that section on March 1, 1908. As to sec. 1953*n*, it is argued that it impairs the obligation of contracts and is violative of the defendant's rights as guaranteed by the XIVth amendment to the federal constitution, and that in any event the action will not lie because the penalty sued for cannot be recovered, for the reason that it is not applicable to sec. 1953*n*.

The view we have taken of the case necessitates a discussion of but two questions: (1) Did the defendant violate the provisions of sec. 1954 by failing to comply therewith? and (2) Can the penalty prescribed by sec. 1954 be recovered for a violation of the provisions of sec. 1953*n*?

The answer to the first question depends on whether the defendant was "doing business" within the state after its attempted withdrawal, within the meaning of those words as used in that statute. If it was, then it violated the law by failing to file the required report, and is liable for the penalty imposed by that section for its violation.

The defendant has in force in Wisconsin 283 policies of life insurance. The amount of such insurance in the aggregate, or the amount of annual premiums collected thereon, does not appear in the record, but presumably both amounts are quite large. By its insurance contracts in force the defendant is obligated to notify policy-holders when their premiums are about to become due, and it appears from the sam-

ple policy made a part of the record that such premiums fall due annually. It is admitted that the defendant has complied with its contracts by giving the required notices. The defendant continues to collect its premiums and to pay its obligations under its policies as they mature. It is almost inevitable that the prudent conduct of the business carried on in Wisconsin will necessitate investigations of claims made under policies in force in this state and which must of necessity be made therein. It may be conceded that the defendant has done everything in the way of attempting to cease doing business in the state which it might do without violating the obligations of its contracts which were in force when it ceased to take any new insurance because certain laws passed in 1907 were obnoxious to it. It thereafter employed no agents in Wisconsin and sought no new business therein, and conducted its business with reference to outstanding contracts by correspondence through its home office in Boston or through agents residing without the state. Notwithstanding these facts, we entertain little doubt that the acts which the defendant must of necessity do in order to carry out its contract obligations with policy-holders residing in this state constitute doing business therein, so that defendant is subject to reasonable regulation for the benefit of residents of Wisconsin holding its obligations. The highest tribunal in the land has said that the identical acts which the defendant in this action is performing in reference to its insurance contracts constitute doing business within a state. *Conn. Mut. L. Ins. Co. v. Spratley,* 172 U. S. 602, 610, 611, 19 Sup. Ct. 308; *Commercial Mut. Acc. Co. v. Davis,* 213 U. S. 245, 255, 256, 29 Sup. Ct. 445. Nothing that is out of harmony with this view of the law is said in *Chicago T. & T. Co. v. Bashford,* 120 Wis. 281, 97 N. W. 940. The controversy there related to a single transaction. The mortgage sought to be foreclosed was given before sec. 1770*b*, Stats. (1898), was passed. The corporation owning it did no act

in reference thereto except to commence a foreclosure action in the courts of this state long after the indebtedness fell due, and it was held that neither the passive holding of a lien acquired prior to the passage of the law nor the commencement of a suit was the transaction of business within the forbidden sense. There is a palpable difference between the nature of the acts performed by the defendant in the case before us and the act of the plaintiff in the *Chicago T. & T. Co. Case.* Where an insurance company is transacting the volume and kind of business that this defendant is transacting from time to time with several hundred individuals in Wisconsin, it would be anomalous to say that it was not transacting business here because it did not happen to have a resident agent within the state. It is not doing all the kinds of business which it transacted before, but it is none the less doing business.

But it does not follow that because the defendant is doing business in Wisconsin it is doing business here within the meaning of sec. 1954, Stats. (Laws of 1907, ch. 597). To determine that question we must endeavor as best we may to ascertain the legislative intent. There are persuasive considerations that suggest the conclusion that the legislature, in using the words "doing business," meant such business as was usually carried on by corporations regularly licensed to transact business in this state.

By ch. 59, Laws of 1870, the legislature adopted a comprehensive scheme for the regulation of the business of life insurance in Wisconsin. This act repealed ch. 158, Laws of 1867, which prescribed the conditions under which domestic companies might transact a life insurance business, and also repealed ch. 179 of the general laws of the same year, which regulated foreign life insurance companies desiring to do business within the state. While said ch. 59 has frequently been amended and added to by subsequent legislatures, it, in reality, furnishes not only the basis of our present law relative to the conduct of life insurance business in Wisconsin,

but also the body of it, as will be seen by a reference to the revisers' notes under secs. 1947 to 1954, inclusive, Stats. (1898). The act of 1870 prohibited any life insurance company from transacting any business in this state without first having obtained a license therefor. Sec. 27. This provision is found in sec. 1947, Stats. (1898). Every life insurance company not organized under the laws of this state, and desiring to do a life insurance business therein, was required to file a copy of its charter with the secretary of state before doing any business within the state. Sec. 21. This requirement is found in sec. 1953, Stats. (1898), which section, however, names the commissioner of insurance, instead of the secretary of state, as the officer with whom the filing must be made. Such company was also required to appoint an attorney upon whom process might be served as a prerequisite of doing business within the state, and such appointment was to continue so long as there was any outstanding liability against the company therein. Sec. 15. This subject is covered by sec. 1953, Stats. (1898). By the provisions of secs. 4, 6, 7, and 9 life insurance companies doing business in the state were required to file an annual report, giving detailed information about their business, as well as facts that might bear upon their solvency. The provisions of these four sections, as subsequently amended, are found in sec. 1954, Stats. (1898). This law contemplated that no foreign life insurance company should transact any business in this state until it had satisfied the proper authorities that it was solvent, that it had procured a license entitling it to do business, and had appointed an agent upon whom process might be served. It did not recognize the transaction of business under any other condition. When it spoke of transacting "any business," it meant any business which an insurance company was licensed to transact. When these requirements were complied with as a matter of safety to policy-holders, the data first required by sec. 7 of the act, and later by sec. 1954, Stats. (1898),

should be furnished and filed annually by companies doing business in the state, so that its proper officers might keep in touch with the financial standing of the company. When the legislature provided in detail the conditions under which a life insurance company might do business within the state, and then provided for reports that should be made by such companies doing business therein, it is reasonable to suppose that it intended such provisions to apply to companies complying with its regulations and holding its licenses to do business. This view is strengthened by sec. 22 of the act, which defined the acts that should constitute a person an agent for a life insurance company, and by sec. 23, which provided that: "Any agent making insurance, in violation of any law of this state regulating life insurance companies, shall forfeit for each offense, a sum not exceeding five hundred dollars." The provisions of secs. 22 and 23 are, in all their essential features, found in secs. 1976 and 1977, Stats. (1898). No doubt the legislative thought was to reach insurance companies which had not complied with the law, by imposing a severe penalty on the agents who represented them in the transaction of an unlawful business. The arrangement of the various provisions of the law of 1870 in our Revised Statutes, and the amendments thereto that have been enacted from time to time, do not suggest any legislative purpose to enlarge the meaning of the words "doing business" or to give them a more comprehensive import than they had in the original act.

But the most cogent reason to support the construction which we adopt is found in sec. 1953*n*, Stats. (Laws of 1907, ch. 584), under which this action is brought. It provides (1) that companies doing business within the state shall file the report required thereby; and (2) that companies having in force any policies within the state, issued or delivered therein, shall file such report. If the legislature intended that having policies within the state should constitute doing

business therein, within the meaning of sec. 1954, then the words "or having in force any policies issued or delivered therein" are entirely superfluous. It is an elementary rule for the construction of statutes that effect must be given, if possible, to every word, clause, and sentence thereof. 2 Lewis's Suth. Stat. Constr. § 380, and cases cited. This rule of well-nigh universal application would necessarily be ignored if we should hold that the words "doing business," as used in sec. 1953*n* or in sec. 1954, Stats., were intended to reach the case of an insurance company which had taken out no license to do business in the state and which maintained no agents therein and which transacted only such business within the state as it was obligated to transact under its existing contracts. We conclude that the defendant in this case did not violate the provisions of sec. 1954, Stats. (Laws of 1907, ch. 597), by failing to file the report required thereby. It is apparent, however, that defendant did violate sec. 1953*n* by failing to file the report required by that section, and it remains to be considered whether the penalty provided for by sec. 1954 is recoverable for a violation of sec. 1953*n*.

Sec. 1953*n* itself provides no penalty for its violation. At the same session of the legislature at which sec. 1953*n* was passed, the general provision found in sec. 1955*o*—5 was enacted, evidently intended to cover any omissions in the way of punishment for violations of the provisions of the numerous laws passed at that session for the regulation of life insurance companies. Penal statutes have always been strictly construed in this state. *Stone v. Lannon,* 6 Wis. 497; *State v. Huck,* 29 Wis. 202; *Coleman v. Hart,* 37 Wis. 180; *Cohn v. Neeves,* 40 Wis. 393; *Wright v. E. E. Bolles W. W. Co.* 50 Wis. 167, 6 N. W. 508; *Crumbly v. Bardon,* 70 Wis. 385, 36 N. W. 19. It has been held that a criminal statute should not be so construed as to multiply offenses where such a construction can reasonably be avoided. *Wilson v. State,* 1 Wis. 184. This principle is equally applicable to penalties. The

penalty provided by sec. 1954, Stats., is severe. If it is applicable to the case before us, the defendant has already incurred liabilities thereunder aggregating $11,000. It was stated on the oral argument, and not denied, that there were thirty other life insurance companies that were subject to like penalties. It is argued that the penalty provided by sec. 1955*o*—5 is more severe than that found in sec. 1954. As to a person, no doubt it is, because it provides for imprisonment. As to a corporation, it may be in some cases if the maximum fine is imposed. But penalties that increase progressively from month to month, at the rate of $500 per month, are severe when the nature of the dereliction in this case is considered, and, we believe, much greater than the fine any court would ordinarily impose under sec. 1955*o*—5.

It would have been an easy matter to amend sec. 1954 so as to require any insurance company doing business in this state, or having policies in force therein, to make the report called for by that section. The section was in fact amended as part of the general legislative scheme for regulating the business of life insurance in 1907. It would have been easier still to have added a sentence to sec. 1953*n* extending to that section the penalty provided in sec. 1954. Neither course was taken; and we are asked to supply the omission, if omission there was, either by saying that the legislature intended that the penalty clause in sec. 1954 should apply in case of a violation of sec. 1953*n*, or that sec. 1953*n* should be construed as an amendment to sec. 1954. The method of statutory arrangement adopted by the legislature of 1907 negatives the idea that sec. 1953*n* was intended as an amendment of sec. 1954. Were this so, sec. 1954, embodying the amendment, would have been rewritten, thus obviating the necessity of creating a new and independent section in our statutes. A plausible argument may be urged in support of the contention that the legislature intended that the penalty sued for should be recovered for a violation of sec. 1953*n*. But, after all, we

come back to the proposition that the legislature has not said so; that its silence is significant; that one who seeks to recover a penalty must show legal authority to collect it; that statutes imposing penalties must be strictly construed and will not be extended by implication; and that questions of doubt are to be resolved favorably to those from whom it is sought to recover the penalty. See collection of cases under note 5, 13 Am. & Eng. Ency. of Law (2d ed.) 55.

If, by requiring to be filed with the commissioner of insurance certain information, together with the report required by sec. 1954, the legislature meant that the penalty provided by that section should measure the liability of the recalcitrant company, it should have said so, and not have left so important a matter to be the subject of speculation and conjecture. The conclusions reached render it unnecessary to decide upon the constitutionality of secs. 1953*n* and 1955*o*—5, Stats. (Laws of 1907, ch. 584 and ch. 483).

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

TIMLIN, J. I concur in the reversal of this judgment, but not with all that is said in the opinion. I think the reversal might also have been put upon these grounds: The legislature itself in enacting the statute in question (sec. 1953*n*) distinguished between life insurance companies doing business in this state and those merely having in force policies of life insurance issued or delivered in this state. This distinction is necessary to harmonize the provisions of other statutes upon the same subject, and it is in line with the decision of this court in *Chicago T. & T. Co. v. Bashford,* 120 Wis. 281, 97 N. W. 940. Having come to the conclusion that the appellant is properly classed as an insurance company "having in force policies issued or delivered" in this state, the question arises whether a foreign corporation, having withdrawn from this

state except for the purpose of service of process to enforce its former contracts, can be made subject to a penal law of this state for failure to make and file with the insurance commissioner annual reports. I think the case in this particular is ruled by *McBride v. Fidelity & C. Co.* 14 Tex. Civ. App. 280, 37 S. W. 1091; *Hooper v. California,* 155 U. S. 648, 15 Sup. Ct. 207 (properly interpreted); *Pennoyer v. Neff,* 95 U. S. 714; *State v. Lancashire F. Ins. Co.* 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348; *Hammond P. Co. v. Arkansas,* 212 U. S. 322; *American B. Co. v. United F. Co.* 213 U. S. 347.

Unlike cases involving the offense of "uttering" or "publishing," the act or omission here sought to be penalized took place outside of the limits of the state, after the withdrawal of appellant from the state, and the appellant was not at the time actually or constructively within the state or a citizen of this state. *McBride v. Fidelity & C. Co., supra; Comm. v. Kunzmann,* 41 Pa. St. 429.

WEED and others, Appellants, vs. BERGH, Commissioner of Banking, and another, Respondents.

January 15—February 1, 1910.

(1-4) *Banks and banking: Regulation: Requiring banks to be incorporated: Constitutional law: Deprivation of property: Due process of law.* (5) *Statutes: Enactment: Alteration before approval.*

1. Banking is a common-law right pertaining equally to every member of the community, and cannot be prohibited under a constitution like that of Wisconsin, which recognizes the right and authorizes the legislature to regulate and supervise it.
2. Under the constitution of Wisconsin banking may be regulated so far as may be reasonably necessary to secure the public welfare and safety, but it must be true regulation, not prohibition under the guise of regulation.

3. Sec. 2024—78*m*, Stats. (Laws of 1909, ch. 285), making it unlawful for any person, copartnership, association, or corporation to do a banking business without being incorporated as a bank,—it being possible for three adult residents of the state so to incorporate at any time,—is not a prohibition, but is a valid regulation, of banking.
4. Ch. 285, Laws of 1909, giving to existing private banks but three months after its publication to become corporate banks, is not shown, with respect to the plaintiffs in this case, to necessitate any sacrifice or loss of property such as might render the act void under constitutional guaranties.
5. Where, as it passed the legislature, an act contained a proviso in one part of a section, but before approving it the governor changed the position of such proviso, not in any way altering its effect, such change, even if unauthorized, did not invalidate the statute.

APPEAL from an order of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action in equity brought by a private banking partnership against the banking commissioner and the district attorney of Waupaca county to restrain those officials from enforcing ch. 285, Laws of 1909, requiring all private banking concerns to incorporate, on the ground that the law is unconstitutional. The plaintiffs appeal from an order sustaining a general demurrer to the complaint.

By the complaint it is alleged that the plaintiffs are copartners and have been such for many years, engaged in the lumber, farming, and milling business at Weyauwega, Wisconsin, and since 1870 have also been doing a banking business at Weyauwega, consisting of receiving deposits, discounting and negotiating notes, buying and selling exchange, etc.; that in 1873 they organized a corporation with a capital stock of $30,000, called the Weed & Gumaer Manufacturing Company, to carry on their general business, which corporation keeps separate books of account and has assets consisting of unincumbered real estate, mills, and other property in and about Weyauwega worth $160,000; that the copartnership has now on deposit with it, as private bankers, upwards of $250,000, and has loaned out over $200,000 on first-class se-

curities, many of which will not come due till after September 1, 1909; that they passed successfully through the panics of 1893 and 1907 and have the confidence and respect of the community; that the defendant *Bergh* as state banking commissioner, and the defendant *Severson* as district attorney, threaten that unless the plaintiffs incorporate or go out of the banking business they will cause criminal warrants to be issued and prosecute the plaintiffs under ch. 285, Laws of 1909; that in order to comply with that law it would be necessary for plaintiffs to incorporate in a sum in excess of $150,000 or to immediately convert their real estate and chattel holdings into personal property, and that to attempt such a thing would result in forced sales at inadequate prices, confiscation of their property, destruction of their business, and irreparable damage; that the law violates the following provisions of the constitution of Wisconsin, viz.:

Art. I, sec. 1: "All men are born equally free and independent and have certain inherent rights; among these are life, liberty, and the pursuit of happiness."

Art. I, sec. 8: "No person shall be held to answer for a criminal offense without due process of law."

Art. I, sec. 13: "The property of no person shall be taken for public use without just compensation therefor."

Art. I, sec. 22: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

—that the law also violates the XIVth amendment to the constitution of the United States, which inhibits any state from depriving any person of life, liberty, or property without due process of law, and from denying to any person the equal protection of the laws.

For the appellant there was a brief by *Kronshage, McGovern, Goff, Fritz & Hannan* and *Byron B. Park,* and oral argument by *Mr. Guy D. Goff* and *Mr. Park.*

For the respondent there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, and oral argument by *Mr. Jackson.*

The following opinion was filed February 1, 1910:

WINSLOW, C. J. Ch. 285 of the Laws of 1909 adds three sections to the general banking laws of the state, numbered, respectively, 2024—78*l*, 2024—78*m*, 2024—78*n*. The first of these sections provides that "the soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal." The second of the sections named makes it unlawful for any person, copartnership, association, or corporation to do a banking business without being incorporated as either a national, state, mutual savings, or trust company bank, and makes a violation of the provision a misdemeanor punishable by fine or imprisonment, or both. The third of the sections provides that any person, copartnership, association, or corporation doing business in the state as defined in the act may incorporate as a state bank on or before September 1, 1909, as provided in sec. 2024—55 of the Statutes. The act was approved June 3, 1909, and published on the following day.

The general banking law of the state (sec. 2015 to sec. 2024—81, Stats.: Supp. 1906) was passed as ch. 234, Laws of 1903, and was amended by ch. 109, Laws of 1905; and these laws, as well as the amendment now under consideration, were passed supposedly pursuant to the terms of the amendment to sec. 4, art. XI, of the constitution adopted at the general election of 1902, authorizing the legislature, by two-thirds vote of the members elect of each house, to enact a general banking law "for the creation of banks and for the regulation and supervision of the banking business."

The plaintiffs claim that the act of 1909 is unconstitutional on two general grounds: *first,* because every citizen has a common-law right to transact a banking business, and the law in question amounts to a prohibition of that right; *second,* because the law in question fixes so short a time within which the plaintiffs must convert their private institution into an incorporated institution that it cannot be obeyed without a ruinous sacrifice of property amounting to practical confiscation.

1. There are some fundamental propositions so well settled that it is only necessary to state them. Among these are the following: *first,* banking is a common-law right pertaining equally to every member of the community; *second,* being a common-law right, it cannot be prohibited under a constitution like ours, which recognizes the right and grants power to the legislature to regulate and supervise it; *third,* under such a constitution as ours, banking may be regulated so far as may be reasonably necessary to secure the public welfare and safety, but it must be true regulation, not prohibition under the guise of regulation. 1 Morse, Banks & Banking (4th ed.) § 13.

With these principles in mind, it seems evident that the ultimate question under this head is whether the requirement that all who wish to enter into the business should incorporate is in fact regulation or prohibition masquerading as regulation. The question is not whether it be the wisest form of regulation, or whether it be a form which commends itself to the judgment as ideal, but whether it be in fact a *bona fide* form of regulation with some reasonable adaptation to meet and overcome any evils or dangers to the public which may lurk in unrestrained exercise of banking rights by individuals. We think it is. If it should be granted that individual bankers may be successfully subjected to all the provisions as to visitation, inspection, examination, and the making of reports to the same extent as corporations, it still must be conceded

that there are at least two well-defined dangers to the public which are and must be present in private banking which are eliminated in corporate banking. The first of these is the danger that the private banker, by engaging in outside business ventures, may subject his banking assets to the claims of business creditors, and thus greatly prejudice, if not destroy, the remedies of bank depositors; and the second is the danger and inconvenience which is likely to result when a private banker dies and the business has to be temporarily suspended for the purpose of probating the estate, involving perhaps destruction of public confidence and a run on the institution.

Both of these dangers are quite real and serious, and both are quite effectually eliminated in the case of a corporation whose business enterprises are strictly limited to banking, and which does not die. It will not avail to say that possibly remedies might be devised to meet these inherent dangers arising in individual banking by other forms of regulation, though we are inclined to think that this would be very difficult of accomplishment without overstepping some of the constitutional guaranties of rights to the citizens. If, as matter of fact, the requirement of incorporation is a form of regulation reasonably calculated to meet and remedy these difficulties, though not in the wisest way, it must be sustained as an exercise of the police power. We have been referred to but one case which holds the contrary doctrine, viz., *State v. Scougal*, 3 S. Dak. 55, 51 N. W. 858, which indeed holds that an act requiring incorporation as a condition of doing banking is unconstitutional. The discussion of the question there is long and learned, but not convincing to us. It is to be noted, further, that the constitution of South Dakota contains an unusual provision which figures largely in the result. This provision is to the effect that no law shall grant to any citizen, class of citizens, or corporations privileges or immunities which on the same terms shall not equally belong to all citizens or corporations. The weight of decision as well as text-

book authority is the other way, however. 1 Morse, Banks & Banking (4th ed.) § 13; 5 Cyc. 433; Boone, Banking, § 10; *State v. Woodmansee,* 1 N. Dak. 246, 46 N. W. 971; *Myers v. Manhattan Bank,* 20 Ohio, 283.

The objection that the law absolutely prohibits an individual banker from doing business and hence cannot be considered as valid regulation is plausible but not convincing. Many police regulations have the effect of prohibiting a business unless certain conditions are first complied with. The legislature says, If you wish to engage in this *quasi*-public business of banking, you must first secure a corporate charter. It does not say, You cannot go into it, but, You must go into it in a certain way which is deemed the safest for the public. The obtaining of a bank charter is made by the act practically a matter of course. Three adult residents of the state may at any time associate together, execute the required articles and file them, and the corporation is formed. The danger that any citizen who wishes to go into the banking business will be unable to find two other adult residents who will be willing to join in executing the written articles of incorporation is so small as to be negligible. People can do banking as before, except that they must do it by means of a corporate organization. This is regulation, not prohibition. *Comm. v. Vrooman,* 164 Pa. St. 306, 30 Atl. 217; *People v. Loew,* 19 Misc. 248, 44 N. Y. Supp. 42.

The scope of the act under consideration, and the question as to the kinds of business which it covers, are considered in the case of *MacLaren v. State, post,* p. 577, 124 N. W. 667. As the act, under any possible construction, unquestionably applies to the business transacted by the appellants, it becomes unnecessary to consider in this opinion what other business operations it may cover.

2. The act gives but three months in which to convert a private bank into a corporate bank, and the complaint alleges that the plaintiffs will be obliged either to incorporate in a

sum exceeding $150,000 as a capitalization or immediately convert their real estate and chattels into money at forced sales which would entail great loss and practical confiscation. The complaint alleges that the deposits of the bank aggregate $250,000 and the loans and discounts on first-class securities, including loans to the Weed & Gumaer Manufacturing Company corporation, exceed $200,000. The amount of cash and other assets is not stated.

In villages having less than 1,500 inhabitants (of which class Weyauwega is one) the capital stock of a bank is not required to be more than $10,000. Sec. 2024—6, Stats. (Supp. 1906; Laws of 1905, ch. 109, sec. 1). The allegation that in order to incorporate under the law the plaintiffs will be obliged to capitalize at $150,000 or dispose of their real property apparently has no foundation, unless it means that as private bankers they have loaned to their corporation so large a sum that under the provisions of sec. 2024—32, Stats. (Supp. 1906; Laws of 1905, ch. 109, sec. 3), they must have a capitalization of that amount in order that the loans to a single corporation will not exceed that fraction of the capital stock which that section prescribes, viz., thirty per cent. of capital and surplus or fifty per cent. in case such percentage is approved by a two-thirds vote of the directors. If this be the case, still we fail to see how the sacrifice of the plaintiffs' property is necessitated. According to the complaint the corporation has $160,000 worth of unincumbered real and personal property. It goes without saying that loans on this property can be readily obtained at reasonable rates of interest on long or short time, as the plaintiffs may desire, which would enable them to reduce their bank loans to any figure which may seem best. All the time necessary to convert their property into money at the most favorable prices may thus be obtained.

A minor objection is made to the act, in this: that it is alleged that the proviso appearing at the end of the first

section of the act as printed appeared in the first line of the section after the words "to read" when the act went to the governor for his approval, and was changed to the end of the section by the governor before approval. Referring to the Senate Journal for 1909, pp. 793, 852, 863, it appears that the bill as introduced in the senate lacked the proviso, but that it was amended in the senate by adding at the end of sec. 1 the proviso, and as so amended was concurred in by the assembly. Sec. 1 of the bill does not end with the words "to read," but rather with the word "statutes" at the end of sec. 2024—78*n*, a position where it would be exactly as appropriate and forceful as at the end of sec. 2024—78*l*. It further appears (Senate Journal, p. 874) that a resolution was passed in the senate directing the committee on enrolled bills to correct the error and place the amendment at the end of sec. 2024—78*l*. This resolution, however, does not appear to have passed the assembly. In any event it seems immaterial. The bill passed with the proviso in a place where it would be just as effective as in the place where it appears in the printed statutes, and the change of position, even if unauthorized, cannot be considered as vitiating the legislation.

By the Court.—Order affirmed.

MacLaren, Plaintiff in error, vs. The State, Defendant in error.

January 15—February 1, 1910.

Banks and banking: Definition: "Deposit purchase department" in store: Regulation: Powers of legislature.

1. A person or corporation engaged in the business carried on by banks of deposit or of discount or of circulation is doing a banking business, although but one of these functions be exercised.
2. The proprietor of a store which, in a "deposit purchase department," receives deposits of money, issues passbooks evidencing such deposits, pays interest thereon, and gives to the depositor an option to withdraw the deposit on demand, with interest,

either in money or in goods, is doing a banking business within sec. 2024—78*l*, Stats. (Laws of 1909, ch. 285).

3. Independent of authority specifically granted in the constitution, the legislature may regulate banking, and might regulate the business of receiving deposits of money as above stated, even though that were held not to be banking.

4. It was competent for the legislature to define as banking the business of receiving deposits as above stated, even if it were not so in fact, and to throw around such business the general safeguards provided for the banking business proper.

5. A general law enacted for the purpose of regulating a business which the legislature has power to regulate is not invalid merely because some persons upon whom it operates may be compelled to reconstruct their methods or cease to do such business.

6. It is not herein decided that the proprietor of a store may not receive money on deposit from its patrons, to enable the depositors to purchase goods from the store, where the money is used for that purpose.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Affirmed.*

Gimbel Brothers, a foreign corporation, is engaged in the business of running a large general store, commonly called a department store, in the city of Milwaukee, and the plaintiff in error is the general manager of its business at that place. The corporation maintains what is termed a "deposit purchase department." Persons desiring to deposit money with the corporation may do so to the amount of $500. Interest at the rate of four per cent. per annum is allowed on all deposits left three months, and interest is credited on balances on January 1st, May 1st. and September 1st in each year. The depositor may purchase goods at the store against the amount of his deposit, or he may withdraw the same at any time in cash without notice. The corporation failed to comply with the provisions of secs. 2024—78*l*, 2024—78*m*, and 2024—78*n*, Stats. (Laws of 1909, ch. 285), and the plaintiff in error, as its manager, was arrested and convicted for violating the statutes in question. From a judgment of conviction he prosecutes a writ of error in this court.

For the plaintiff in error there was a brief by *Glicksman,*

Gold & Corrigan, attorneys, and *F. C. Winkler,* of counsel, and oral argument by *Mr. Nathan Glicksman* and *Mr. Winkler.*

For the defendant in error there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, and oral argument by *Mr. Jackson.*

BARNES, J. Most of the questions raised by the plaintiff in error, hereinafter called the defendant, are passed upon adversely to his contention in *Weed v. Bergh, ante,* p. 569, 124 N. W. 664. In addition to the points there raised and decided, it is urged that Gimbel Brothers, the corporation employing the defendant, was not engaged in the banking business, and that the legislature could not declare that the mere receipt of deposits constituted such business. The right of the legislature to reasonably regulate the business of the corporation, in so far as it extended to receiving moneys on deposit, is conceded, but it is urged that secs. 2024—78*l,* 2024—78*m,* and 2024—78*n,* Stats. (Laws of 1909, ch. 285), do not constitute valid regulation, but in fact amount to prohibition.

By sec. 2024—78*l* the soliciting, receiving, or accepting of money on deposit as a regular business by a person or corporation is declared to be a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing. Gimbel Brothers opened a "deposit purchase department," received moneys up to $500 from any one desiring to deposit with it, issued passbooks evidencing such deposits, paid interest on the amounts deposited, and paid the principal sum deposited, with interest thereon, on demand, in money or goods, at the election of the depositor. The facts established satisfy every call of the statute, and the corporation was doing a banking business if the acts done in themselves constituted the carrying on of a banking business or if the legislature had the right to say that such acts constituted a banking business.

Banking, in its most enlarged sense, includes the business of receiving deposits, paying checks, loaning money, dealing in bills of exchange, etc., besides that of issuing paper money. Boone, Banking, § 3, and cases cited.

If a bank must transact the various kinds of business enumerated in the above definition in order to be a bank at all, it is apparent that we have no such institutions as state banks in Wisconsin, because such banks are not permitted to issue paper money. But the word is popularly and correctly used in a much more restricted sense. In modern times we have a variety of institutions that do a banking business in the popular sense, although the functions performed by them may be widely variant, and none of them may be doing all of the kinds of business included in the above definition. The business conducted by national banks differs from that done by state banks, in that the latter are not banks of issue, while the savings banks do not usually perform all of the kinds of business transacted by other banks. Trust companies that receive deposits and make loans perform two of the most important functions that are performed by banks generally, and for obvious reasons they are subject to regulation to the same extent that banks are. Morse in his work on Banking (vol. 1, § 2, 4th ed.) says that in order to have a bank "it is essential that there should be a place where, *as a regular business,* the money of others is received on general deposit. There must be a combination of moneys, a joint fund, as a primary condition of the existence of a bank or banker, or the transaction of banking business."

A bank is defined by Webster as "an establishment for the custody, loan, exchange, or issue, of money, and for facilitating the transmission of funds by drafts or bills of exchange; an institution incorporated for performing *one or more* of such functions." The same authority defines a bank of deposit as one "which receives money for safe-keeping."

In *Oulton v. Savings Inst.* 17 Wall. 109, 118, the court said:

"Banks in the commercial sense are of three kinds, to wit: (1) Of deposit; (2) of discount; (3) of circulation. Strictly speaking, the term 'bank' implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping until the depositor should see fit to draw it out for use, but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes and to loan money upon mortgage, pawn, or other security, and at a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense."

"Banks are said to be of three kinds, viz., of *deposit,* of *discount,* and of *circulation.* They generally exercise all of these functions." 1 Bouv. Dict. 217.

The following additional authorities hold, correctly we think, that any person or corporation engaged in the business carried on by banks of deposit or of discount or of circulation is doing a banking business, although but one of those functions may be exercised: *Curtis v. Leavitt,* 15 N. Y. 9, 56; *Reed v. People,* 125 Ill. 592, 596, 18 N. E. 295; *People v. Bartow,* 6 Cow. 290; *Hamilton Nat. Bank v. Am. L. & T. Co.* 66 Neb. 67, 92 N. W. 189.

The term "banking" is generally used in its enlarged sense, but it may also be used in a more narrow and restricted sense. There is no doubt as to the sense in which the legislature intended to use the term here, because it says that the receiving of deposits as a regular business shall constitute banking. Independent of any constitutional authority, there is no doubt about the right of the legislature to regulate banking, and neither is there any doubt about its right to regulate the busi-

ness carried on by Gimbel Brothers in the way of receiving deposits, if it should be held not to be banking.

The main purpose of regulating the banking business as the business is now carried on is to insure the safety of deposits. The calamities that befall individuals and communities as a result of bank failures are well known. The necessity for the regulation of establishments carrying on the kind of business that Gimbel Brothers carries on is just as apparent as it is in the case of regular banking institutions. It receives deposits to the amount of $500 from all persons desiring to leave money with it. The depositors may, if they wish, purchase goods with the money so deposited, but they are not required to do so. It matters not that a depositor has never purchased a dollar's worth of goods from the corporation or that he never intends to. So long as he elects to allow his deposit to remain, he is allowed interest thereon at the rate of four per cent. per annum compounded every four months, and he may withdraw his money at any time he wishes on demand and without previous notice of intention to withdraw it. When the high financial standing of the corporation is considered, the inducement offered to depositors is not only attractive, but alluring. We think it would not be going beyond the domain of common knowledge to say that no bank or trust company doing business in the city of Milwaukee offers so inviting a contract to the small investor in the matter of interest rates and the privilege of converting the indebtedness to the depositor into cash. It was stipulated as a fact that the "deposit purchase department" of Gimbel Brothers had been in operation upwards of a year prior to the date upon which the alleged offense was committed, and that on said date there was deposited with said corporation $115,738.10 by 5,915 different depositors. That the amount was not larger was probably due to the fact that a limit was placed upon the amount that might be deposited by a single person, and the further fact that the business of receiving deposits had not been in vogue

a sufficient length of time so that the community generally was advised of the fact that deposits would be received and of the favorable terms under which they were being received. The payment of the highest rate of return to depositors that a safe investment of the funds intrusted to the care of the recipient will admit of is highly commendable, and for obvious reasons should be encouraged, and there is no suggestion or suspicion of the inability of Gimbel Brothers to meet its obligations to its depositors. But most bankers would be honest if there were no laws regulating the banking business, and the great majority of them would carry on their business on safe and conservative lines. For such there is no necessity for regulation. It is for the dishonest. the careless, or the incompetent banker that regulative laws become essential, and, inasmuch as it is necessary at all to resort to regulation, it must apply to all engaged in the transaction of the same kind of business under substantially similar conditions.

Conceding the entire solvency and ability of Gimbel Brothers to meet its obligations, really proves nothing. Other large or small business establishments that are doing an unprofitable business and are perilously near the verge of insolvency may reach out for deposits with the hope and expectation of arresting the inevitable, anticipating brighter things from the future. There are few honest failures where the insolvent does not believe that with a little more leniency on the part of his creditors and a little greater extension of his credit he will be able to meet his obligations in full. Such a business establishment might well increase the rates of interest to five or six per cent., and place no limit at all on the amount that would be received, or place one much higher than that fixed in the present case. It is not difficult to surmise that, if the practice pursued by Gimbel Brothers became general with mercantile houses in a city like Milwaukee, their deposits would in no long time equal or exceed the time deposits of the banks and trust companies.

Regulation must be carried on through the medium of general laws which often bear more heavily on some than on others owing to the circumstances which surround them. If the general purpose of the law is regulation, and not the suppression of lawful business, the fact that some persons on whom it operates may have to reconstruct their methods of doing business, or cease doing business at all, does not render the law void. This court recently approved a rule, abundantly supported by authority, to the effect that the legislature in enacting a police regulation may include within the purview of the statute acts innocent in themselves and not a subject of police regulation, where the inclusion of the acts is necessary in the opinion of the legislature in order to make the regulation effective. *Pennell v. State, ante,* p. 35, 123 N. W. 115, and cases cited.

Aside from what has been said, it being conceded that the legislature might regulate such business as Gimbel Brothers was carrying on in the way of receiving deposits (admittedly one of the principal functions of a bank), it was competent for the legislature, considering the nature of the business, to define it as banking, if it were not such in fact, and to throw around it the general safeguards provided for the banking business proper. However, we do not wish to be understood as holding that Gimbel Brothers might not receive money on deposit from its patrons, where such money is deposited for the purpose of enabling the depositor to purchase goods from its store and where the money is used for that purpose. The judgment of the circuit court is correct and should be affirmed.

By the Court.—Judgment affirmed.

DODGE, J., dissents.

WIEDEN, Plaintiff in error, vs. THE STATE, Defendant in error.

January 15—February 1, 1910.

Criminal law: Concurrent jurisdiction of courts: Sunday: Keeping open shop.

1. The granting to other tribunals of jurisdiction over certain statutory offenses does not deprive the circuit courts of their constitutional jurisdiction over them, or court commissioners of their power to hold preliminary examinations in such cases, in the absence of unmistakable language in the statute showing such an intent.
2. An hotel keeper who uses a single room both for the hotel office and as a place for selling liquor and cigars is not guilty of keeping open his shop on Sunday, under sec. 4595, Stats. (1898), if on that day he wholly discontinues such sales and keeps the room open for use as such office only.

ERROR to review a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Plaintiff in error was examined in due form before a circuit court commissioner on a charge of having violated sec. 1564, Stats. (1898), prohibiting any tavern keeper or other persons from selling, giving away, or bartering any intoxicating liquors on the first day of the week, and also of having violated sec. 4595, Stats. (1898), prohibiting any person from keeping open his shop on the first day of the week. He was in due form held for trial on both charges before the circuit court for Clark county. An information was duly filed containing, for a first count, the alleged violation of said sec. 1564 and, for a second count, the alleged violation of said sec. 4595. A plea in abatement was interposed, raising the question of whether the court commissioner had jurisdiction of the subject matter of holding the preliminary examination. The plea was overruled and one of not guilty entered.

The evidence, undisputed, was to the effect that the accused,

on the day in question and for some time prior thereto, kept a small hotel or boarding house, using one room for the double purpose of a hotel office and shop for selling intoxicating liquors and cigars. He testified that on Sundays the shop feature was wholly discontinued.

There was evidence tending to show that persons resorted to the place on the Sunday in question and were furnished with liquor of some kind, which they drank at the bar, being served by a person who sometimes assisted the accused, and that the latter was present. The court instructed the jury, there was not sufficient evidence to warrant a conviction of guilty on the first charge in the information, and, in respect to the second charge, that the room, when used for the common purpose of a boarding-house office and saloon, was a shop within the meaning of the statute, and if only a small part of the saloon stock was kept there on Sunday, that would make no difference, and further instructed, as follows:

"The testimony of the defendant is to the effect that the saloon was used as an office for the hotel and that there was no other convenient place for guests to sit. You are instructed that this fact would make no difference. If this was a saloon, a shop, it would be the duty of the defendant to keep it closed on Sunday as required by the statute. It would be no defense that there was no convenient place for the guests to sit or lounge. It is the policy of the law to keep such places closed on Sunday, and it would be no defense that the place was used also for other purposes than that of a saloon. . . . The statute requires such shops for the sale of goods to be kept closed. If the doors were open and persons congregated there and were permitted to transact business, it is not a closed place. The doors should be closed and the place kept shut. If it was a shop for the sale of liquor and tobacco on the day alleged, it was the duty of the defendant to keep it closed, and to use some other portions of the hotel for his guests."

A verdict of guilty under the second count was rendered, and judgment entered accordingly.

For the plaintiff in error there was a brief by *George L.*

Jacques, attorney, and *Homer C. Clark,* of counsel, and oral argument by *Mr. Clark.* To the point that in its instruction the trial court construed the statute too strictly, they cited *Comm. v. Collins,* 2 Cush. 556; *Comm. v. Lynch,* 8 Gray, 384; *Comm. v. Wright,* 12 Allen, 187; *Comm. v. Nagle,* 117 Mass. 142; *Comm. v. Dextra,* 143 Mass. 28, 8 N. E. 756; *Comm. v. Osgood,* 144 Mass. 362, 11 N. E. 536; *Comm. v. Perry* (Mass.) 11 N. E. 537; *Snider v. State,* 59 Ala. 64; *Dixon v. State,* 76 Ala. 89; *City Council v. Talck,* 3 Rich. Law (S. C.) 299; *Wetzler v. State,* 18 Ind. 35; 27 Am. & Eng. Ency. of Law (2d ed.) 397, 398; *Jebeles v. State,* 131 Ala. 41; *Miller v. State,* 68 Miss. 533; *Baxter, Petitioner,* 12 R. I. 13.

For the defendant in error there was a brief by the *Attorney General* and *Emery W. Crosby,* district attorney of Clark county, and oral argument by *Mr. Crosby.* In support of the charge of the court, they cited *People v. Waldvogel,* 49 Mich. 337; *People v. Blake,* 52 Mich. 566; *People v. Roby,* 52 Mich. 577; *People v. Cox,* 70 Mich. 247, 38 N. W. 235; *People v. Cummerford,* 58 Mich. 328, 25 N. W. 203; *Comm. v. White,* 190 Mass. 578.

MARSHALL, J. The contention on behalf of plaintiff in error, that a circuit court commissioner has no jurisdiction to hold a preliminary examination in a case of this sort, and bind the accused over for trial before the circuit court for the county where the offense is alleged to have been committed, and, therefore, the plea in abatement on that ground was improperly overruled, is ruled in the negative by *Faust v. State,* 45 Wis. 273; *State v. Grunke,* 88 Wis. 159, 59 N. W. 452.

Jurisdiction to hear all matters, civil and criminal, within this state is conferred on circuit courts by the constitution, and could not be taken away as to any such matter except by some unmistakable legislative language to that effect. Jurisdiction as to a particular class of offenses, in the sense of want of judicial power, could not be taken away by merely

conferring authority on some other tribunal to hear, try, and determine actions to punish for such offenses. So the mere fact that offenses of the character of the one involved here were created, and authority given to administer the law by prosecutions in justice's court, does not militate against the circuit courts exercising their constitutional jurisdiction in such cases, and, incident thereto, examining magistrates, such as court commissioners, holding preliminary examinations as in other criminal cases.

The instruction that, in case a person devotes one room in his building to the use of a hotel or boarding-house office and place for selling liquor and cigars, as is commonly done, it is not sufficient to comply with sec. 4595, Stats. (1898), to wholly discontinue the shop practice on that day, keeping open only for the office business; but that such compliance requires the actual closing up of the room on that day and use of some other room for an office, or dispensing with the office feature of the hotel or boarding-house business for the day—was erroneous. Neither the letter nor the spirit of the statute goes that far. For that reason the judgment must be reversed and a new trial granted; since the evidence is by no means conclusive that the room was kept open in its shop feature. On the contrary, the evidence so strongly indicates it was not that it is quite probable the jury, under proper instructions, might have found the accused not guilty.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

SEDLACK, Plaintiff in error, vs. THE STATE, Defendant in error.

January 15—February 1, 1910.

Criminal law: Appeal and error: Verdict, when conclusive: Jury: Misconduct: Harmless impropriety.

1. A verdict reasonably supported by credible evidence and approved by the trial judge will not be disturbed on writ of error merely because there is much in the evidence to discredit it.
2. A remark by the clerk of the court, to one or more of the jurors as they passed through the court room in charge of an officer after having been out all night, that their beds were all made up for the night, and the reply of one of them that he thought they would be out before night, constituted merely a harmless impropriety.

ERROR to review a judgment of the circuit court for Clark county: A. H. REID, Judge. *Affirmed.*

In proceedings before a circuit court commissioner plaintiff in error was held for trial at the circuit court for Clark county on two charges, viz.: 1st, violating sec. 1564, Stats. (1898), creating the offense of selling, giving away, or bartering intoxicating liquors on Sunday; 2d, violating sec. 4595, Stats. (1898), creating the offense of keeping a shop open on Sunday. To the information, a plea in abatement was interposed, challenging the right of a court commissioner to act as an examining magistrate and hold persons for trial for such violations as the accused was charged with. The plea was overruled and trial had before a jury on a plea of not guilty.

The accused, as appeared by the evidence without question, kept a hotel using one room in the building as a hotel office and a saloon. There was evidence tending to show that the saloon business was entirely discontinued on the Sunday in question and a curtain suspended from the ceiling around the bar. There was also evidence from several witnesses to the effect that in the evening of such day the bar was open for business; that the accused was behind it; that he served

whisky to persons who stood before the same and that they drank it; but there was no evidence of payment having been made for the drinks.

The court instructed the jury, that if the hotel office was also used as a saloon it was a shop within the meaning of the statute as well as an office, but that it was not a violation of the law to keep it open on Sunday if the saloon business was entirely discontinued on such day, the room being used for a hotel office only; that if the room was kept open for saloon purposes to any extent then the statute was violated whether any such business was actually transacted or not.

The jury found the accused guilty upon the second count.

While the jury were deliberating they had occasion to pass through the court room in charge of the officer. It was about 9 a. m. and after the jury had been out all night. As they did so they passed the clerk of the court who was at his desk. Bedding, which had been used during the night, was piled up in view from the clerk's position. Neither the accused nor his counsel were present. Some words used in a joking way passed between the clerk and one or more of the jurors. In reply to a jocular remark made to the clerk he said, "Your beds are all made up for the night, you see that pile of bedding back there." A juryman replied, "I think we will be out before night."

For the plaintiff in error there was a brief by *George L. Jacques,* attorney, and *Homer C. Clark,* of counsel, and oral argument by *Mr. Clark.*

For the defendant in error there was a brief by the *Attorney General* and *Emery W. Crosby,* district attorney of Clark county, and oral argument by *Mr. Crosby.*

MARSHALL, J. The question of whether the plea in abatement was properly overruled must be answered in the affirmative for the same reasons as those given in respect to a similar question in *Wieden v. State, ante,* p. 585, 124 N. W. 509.

The claim made that the evidence was not sufficient to support the verdict cannot be allowed. It is quite evident from the brief statement of the case, that there was room in the evidence for the jury to reasonably come to the conclusion which they did. That being the case, it matters not that there was also room for a different conclusion, or if it would seem, looking at the printed record, that the evidence rather preponderates in favor of the accused. The accused having had the benefit of an impartial trial before a jury and the benefit of the deliberate opinion of the circuit judge who presided at his trial as to whether the evidence warranted the jury's conclusion, he is remediless on the question of fact if there is any credible evidence to sustain the verdict, even though there is much to discredit it.

The complaint, that the accused was prejudiced by what occurred between some members of the jury and the clerk of the circuit court shortly before the verdict was reached, is without merit. We see nothing in the occurrence but an innocent harmless impropriety. It were better if juries and court officers and all concerned would act in such situations with becoming dignity. It were better, perhaps, if there was less of the modern ease of approach and tendency to take advantage of it, between jurors and outsiders, while the former are acting under their solemn oaths in cases. It were better, perhaps, if jurors during such periods were better protected by restraint, from within and without as well. The writer thinks so. But that must be left very much to the judgment of trial judges. To them is committed the duty of maintaining the standard best calculated to secure just results. Upon them rests responsibility in this field, to a considerable extent where prejudicial error cannot be shown affirmatively, nor be presumed, nor appear by necessary inference, yet may possibly exist. In all such cases there is no remedy. Sec. 2829, Stats. (1898), closes the door if otherwise there would be any.

We are constrained to hold there is none in the circumstances of this case, independently of the statute. This case is entirely unlike *Havenor v. State,* 125 Wis. 444, 104 N. W. 116; *Hurst v. Webster Mfg. Co.* 128 Wis. 342, 107 N. W. 666; *Du Cate v. Brighton,* 133 Wis. 628, 114 N. W. 103; *Dralle v. Reedsburg,* 135 Wis. 293, 115 N. W. 819, and similar cases where the communication with the jury was by the trial judge. The doctrine of those cases cannot be extended. The tendency, perhaps, should rather be the other way in view of the re-enactment in a significantly emphatic way of the principles of sec. 2829, Stats. 1898 [see Laws of 1909, ch. 192: sec. 3072*m,* Stats.]

By the Court.—The judgment is affirmed.

IN THE MATTER OF THE APPOINTMENT OF A REVISOR OF THE STATUTES.

February 4, 1910.

Constitutional law: Validity of statutes: Practical construction: Division of governmental powers: Appointment to office: Judicial powers: Appointing revisor of statutes: Fixing salaries: Holding of other offices by judges: Trustees of state library.

1. An act of the legislature is to be sustained if possible by any reasonable construction of the constitution or of the act itself; and all mere doubts as to its validity are to be solved in favor of the act.
2. When the meaning of a constitutional provision is doubtful, long-continued practical construction thereof by the branches of government affected by it is strongly persuasive and often controlling.
3. Each of the three governmental departments, legislative, executive, and judicial, has exclusive functions which no other department can perform; but there are many governmental operations and duties which do not pertain exclusively to any one department and may be performed by inferior officers or agents in aid of the functions of either.

4. Appointment to office is not exclusively an executive function; and when in the execution of their proper duties it becomes necessary or proper for either the legislative or judicial department to have administrative acts performed by assistants, such assistants may properly be selected by the legislature or judiciary, as the case may be, provided the constitution does not otherwise direct.
5. A court or judge may legally be authorized to appoint an officer, even though he be a state officer, where he is to act in an administrative way as an aid, even though indirectly, to the court in the performance of its judicial functions.
6. The duties of the revisor of the statutes under ch. 546, Laws of 1909 (secs. 116, 117, Stats.), are administrative duties in aid of the execution of the purely judicial functions of the supreme court so that the selection of such revisor and his assistants may properly be committed to the judges.
7. The principle that the courts are only to determine what the law has been and is, and not what it is to be in the future, controls a court in the performance of its strictly judicial duties as a decider of controversies, but is not applicable to administrative acts or functions which it is necessary for the court to perform through agents or employees in aid of its purely judicial duties.
8. The fixing of salaries, even in advance, is not exclusively a legislative power, but may be delegated to a court as to officers or agents whom the court is legally authorized to appoint.
9. To constitute an office, as distinguished from a mere employment, the duties must, in general, be shown to be continuous and permanent, not merely transient, occasional, or incidental.
10. The duties imposed upon the justices of the supreme court by ch. 23, Stats. (1898),—which makes them (with the attorney general) *ex officio* trustees of the state law library, and gives such trustees power to appoint a librarian, make rules, purchase books, etc.,—are ministerial or administrative duties which may properly be imposed upon the judiciary, because they are either helpful or necessary in the performance of the purely judicial functions of the court. In performing such duties the justices do not hold a nonjudicial office in violation of sec. 10, art. VII, Const.
11. So, also, as to the duties imposed by ch. 546, Laws of 1909 (secs. 116, 117, Stats.); and the justices are not attempting to hold another office when, acting as such trustees under that statute, they appoint a revisor of the statutes, fix his salary, approve his selection of assistants, etc.
12. As to the validity of ch. 547, Laws of 1909 (authorizing the trustees of the state library to purchase certain copyrights and

rights to annotations to the statutes), no opinion is intimated by the court.]

SIEBECKER and KERWIN, JJ., dissent as to the validity of ch. 546, Laws of 1909, but accept the opinion of the majority as authoritative for the present purpose and act with other members of the court in executing the provisions of the statute.

TIMLIN, J., dissenting, declines to act under the law.

WINSLOW, C. J. For about a third of a century the justices of this court and the attorney general have been performing certain supposed duties in connection with the management of the state library at the direction of the legislature. These duties have consisted, among other things, in appointing the librarian and approving his bond, determining the character and number of books to be purchased within the limits of the annual appropriation, approving of the bills for such purchases, and prescribing rules and regulations for the use of the library.

Prior to 1876 the governor, secretary of state, and superintendent of public instruction had charge of the library and were called trustees of the state library, but the power to purchase books and appoint the librarian was in the governor alone. R. S. 1858, ch. 10, sec. 9; Id. ch. 26, secs. 1, 2. By ch. 116 of the Laws of 1876 the justices of the supreme court and the attorney general were made *ex officio* trustees of the library in place of the former officials, and by the Revised Statutes of 1878, sec. 368, they were given the power of appointment of the librarian and the power to approve his bond. The reason for this change in control doubtless lay in the fact that the state library was originally not entirely or even chiefly a law library, but consisted largely of scientific, historical, and purely literary works; but after the library of the State Historical Society had become firmly established it fully occupied the field of general literature, and the state library became solely a law library. This change had taken place prior to 1876, and hence it doubtless seemed to the legislature as eminently fitting that a library which was almost entirely

used in and about the preparation and decision of lawsuits should be subject to the general supervision of the justices of the supreme court and the highest law officer of the commonwealth. Whether this was the true reason for legislative action or not, the change was made, and during the time that has elapsed since that change, though there have been a number of the state's eminent lawyers upon the bench (and among them one who took a prominent part in framing the constitution), no one of them has ever declined to perform these occasional duties of supervision, or deemed that there was any constitutional objection to the delegation of such duties to them. I speak from knowledge as to the last eighteen years, and from reliable information as to the preceding fifteen years.

In the year 1909 the legislature, becoming convinced that a gradual revision of the statutes under a competent head, who should devote his entire time to the subject, was the true solution of the difficulties arising from the multiplication of laws, passed an act (ch. 546, Laws of 1909) providing for the appointment of a "revisor of the statutes" and prescribing his duties. Doubtless with the idea that this work would be of great assistance to the court and that the justices of this court and the attorney general would or should be exceptionally well informed as to the abilities of possible appointees as well as to the nature of the work to be done, the legislature provided that such officers should make the appointment, fix the appointee's salary (within a certain limit), have the power of removal, and approve the appointment of the revisor's assistants, as well as approve the printing of any compilation of statutes, index, or notes ordered by the legislature. By ch. 547 of the laws of the same year, the same officials were authorized in their discretion to purchase the copyrights of the statutes of the state and annotations thereto, owned by private parties, at prices not exceeding the appropriation carried by the act. These acts did not become effective until late in June, 1909, after

the members of the court had separated, and hence they did not come up for consideration until the fall.

The question whether these last-named laws are constitutional has now been directly raised by Mr. Justice TIMLIN, and as a result the subject has been taken up and considered by the entire bench, and it has been deemed best, owing to the importance of the question, that an opinion should be written and filed expressing the views of those of the justices who have deemed it their duty to act under at least one of the laws last mentioned. This opinion is the result of that determination.

The question is to be approached, of course, with the principle in mind that all deference is due to an act of the legislature; that it is to be sustained if possible by any reasonable construction of the constitution or of the act itself; and that all mere doubts as to its constitutionality are to be solved in favor of the act.

That our constitution, like the constitutions of other American commonwealths, recognizes the division of general governmental powers into three distinct parts, viz., legislative, executive, and judicial, and commits each part to a co-ordinate department of the government, is fundamental and undeniable; that it has endeavored to provide effectively against the encroachment of one of these departments upon the proper field of either of the others is equally fundamental and undeniable. No time will be spent by me either in tracing the history or vindicating the wisdom of this scheme of government; others have written on these subjects more eloquently and convincingly than I could hope to write.

Only the judicial power has been given to the courts of Wisconsin, and the constitution further provides that judges of the supreme and circuit courts "shall hold no office of public trust, except a judicial office," during their terms. Sec. 10, art. VII, Const. Both of these courts are purely judicial courts. *In re North Milwaukee,* 93 Wis. 616, 67 N. W.

1033. Taking up first the state library law and the revisor law, the questions involved are: (1) Whether these acts attempt to invest the judges with executive or legislative power, and (2) whether, by acting under them, a judge is attempting to hold an office of public trust not judicial.

It is easy to give general definitions of the three great governmental powers. The legislative power is the power which makes the laws; the executive, the power which enforces them; and the judicial, the power which expounds and applies them. Would that it were as easy to apply these general definitions to a concrete case! It is familiar to all who have considered the subject at all that between these several powers, which seem so distinct in their general character, there are great borderlands of power which may be said to approach nearer and nearer until they merge gradually into each other. In these borderlands it is often difficult to tell where one power ends and the other begins. This was not so marked a condition in earlier and simpler conditions of society as it is today. With the development of the complex conditions of modern civilization there have come governmental necessities undreamed of by our fathers. Fifty years ago there was no necessity for that new and remarkable governmental agency known as the "commission," while now it fills a wonderful and increasingly important place in our governmental scheme. Though not named in the constitutions and not dreamed of by their makers, the commissions which regulate and control public utilities of the states and the nation are today wielding powers scarce second to the powers of either of the three original departments of the government. Though they are truly executive agencies and have neither legislative nor judicial powers, they are daily doing many things which vitally affect the life, liberty, and happiness of the people, and in doing these acts they are exercising powers trenching closely on the judicial and the legislative. In effect they decide real controversies like courts, and they daily coerce vast interests by

regulations which fifty years ago would have been thought to be nothing short of legislation; yet in the exercise of these powers they have been almost universally sustained. This does not mean that the distinction between legislative, executive, and judicial functions has passed away, or that the constitutional division of powers is worn out, but simply that as matter of fact it is impossible to say at any given place: here is a line where legislative power ends and judicial power begins; all on one side of this line is legislative and all on the other side is judicial, and no single power can be both. Each department has exclusive functions which no other department can perform, but this does not mean that there may not be functions common to all the departments. It is the exclusive function of the legislature to make laws, and it is the exclusive function of the courts to expound the laws; but the power of neither department is exhausted by the performance of such exclusive function. There are many other governmental operations and duties not properly to be classified under either head, nor exclusively executive in their character, and which may be performed by inferior officers or agents in aid of the functions of either great department.

Appointment to office, while generally called an executive function, cannot under our constitution be classed as exclusively a function of either of the three great departments. Indeed, as matter of fact, the constitution reserves the power in large degree to the people themselves. Sec. 9, art. XIII, Const. It is frequently spoken of as typically an executive power; but when in the execution of their proper duties it becomes necessary or proper for either the legislative or judicial department of the government to have administrative acts performed by assistants, such assistants may properly be selected by the legislature or judiciary, as the case may be, provided the constitution does not otherwise direct. This must be held to be settled in this state by the case of *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475, where the power given

to circuit judges to appoint jury commissioners was upheld after very thorough consideration by this court, a trifle more than two years since. It is to be observed in this case also that the jury commissioners were held to be officers either of the state or the judicial circuit, and not mere employees of the state. So we have the initial proposition settled, to wit, that a court or judge may be legally authorized to appoint an officer, even though he be a state officer, in cases where the duties of the officer are to assist the court in the performance of acts of an administrative character, necessary or proper to the due discharge of judicial duties.

But our court has certainly gone further than this. The power given to the circuit judge to appoint commissioners to equalize county valuations of property for taxation and audit their bills for services and expenses (sec. 1077*a*, Stats. 1898) would not seem to come within the category of powers necessary or even convenient for a court to have in order to perform its constitutional duties, yet this law has been repeatedly sustained. In the early cases there was no mention of the particular objection now under consideration, but finally in *Foster v. Rowe,* 128 Wis. 326, 107 N. W. 635, the claim that it was a nonjudicial duty was fully argued, and this court expressly overruled it and held the legislation valid, apparently on the ground that the commissioners were only a temporary tribunal to perform certain *quasi*-judicial duties in taxation proceedings. In making this decision not only were the former Wisconsin cases cited in which the law had been sustained against attack on other grounds, but reference was made to adjudged cases from the states of Colorado, Georgia, New Jersey, and Ohio, in which cases respectively it was held that courts might properly be authorized to appoint the following officers, viz.: (1) Commissioners to call and conduct an election to determine the question of incorporation or not; (2) a board of commissioners for the registration of voters and management of elections generally; (3) commissioners

to lay out public parks in cities; and (4) trustees to build and operate a commercial railway to be built by the city of Cincinnati. Reference was also there made to the text on page 1060 of 6 Am. & Eng. Ency. of Law (2d ed.), where it is said that though there is a division of authority on the question whether the exercise of the appointing power by the judiciary is an infringement of the constitutional separation of governmental functions, a majority of the courts which have passed on the question have sustained the power, and that so far as the question relates to ministerial officers and assistants of courts the power of appointment seems to have been exercised without question where it was properly conferred. See, also, 23 Cyc. 538, 539, where the validity of laws authorizing judges to do very many ministerial acts, including appointments to office, is fully sustained.

Again, the various laws, commencing with ch. 442, Laws of 1885, authorizing circuit courts and judges to organize drainage districts on petition and appoint drainage commissioners to carry out extensive systems of drainage of swamp lands by levying special assessments, have been sustained by this court against vigorous and able attacks, although the exact point now under consideration seems not to have been discussed. *Bryant v. Robbins,* 70 Wis. 258, 35 N. W. 545; *State ex rel. Baltzell v. Stewart,* 74 Wis. 620, 43 N. W. 947; *Muskego v. Drainage Comm'rs,* 78 Wis. 40, 47 N. W. 11. The general law, however, authorizing the formation of such districts and the appointment of commissioners in the same way (sec. 1379—11 *et seq.,* Stats. 1898) was vigorously attacked in the case of *Stone v. Little Yellow D. Dist.* 118 Wis. 388, 95 N. W. 405, as not a judicial proceeding, and after full argument the validity of the statute was sustained. Under this general law it is to be noted that the drainage commissioners appointed by the court or judge are required to take the constitutional oath of office and give a bond, and that they have a definite term which is called their term of office. In a num-

ber of the drainage laws just mentioned the court or judge is authorized to audit the bills of the commissioners before they can be paid.

In view of these decisions it must be conceded, I think, in considering what duties may properly be delegated to courts, that this court has already taken a view which would seem to entirely justify the conclusion, without further examination, that the power to appoint a revisor and his assistants is one which may properly be conferred on the judiciary. However, I desire to give the subject a much fuller examination, and in doing so I wish first to inquire whether it can be fairly held that the duties of the revisor and his assistants are in fact administrative duties, in aid of the execution of the purely judicial functions of this court, so that the selection of such revisor and his assistants may properly be committed to the judges under the principle laid down in the *Anson Case,* before cited. This court is the final judge of the meaning, application, and validity of the statute law of the state. In this latter day, when statutes upon innumerable subjects are multiplying as never before, when new fields of legislative activity are necessarily being opened every year, it is no easy task to follow the course of legislation and be sure that one has seen all the laws on a given subject, or knows just which laws are in force and which have been repealed. Especially is this true as the period following a general revision grows longer. The writer speaks from experience when he says that there have been many times when he would have given much to be able to go to a card index or loose-leaf statute which would inform him at once of the condition of the statute law on a given subject, or give him notes of all the decisions under a section up to date. Now it is to be noted that under the law in question these very things are provided for and seem to form as important a part of the law's purpose as ultimate revision of the statutes. The revisor is required to keep not only a loose-leaf set of the statutes and a card in-

dex thereof, but a loose-leaf ledger of the decisions on the various sections, properly arranged, as well as a loose-leaf set of repealed or superseded provisions, with notes of decisions and a card index thereof. These requirements, if properly carried out, will place in the law library, open to the use of the court and of attorneys, the means of rapid and reliable ascertainment of the condition of the statute law and the decisions thereon, so that the information which now requires hours of research may be obtained in a few minutes. To say that such books and indexes will be of substantial help to this court in the transaction of its great volume of business would be to state a truth which must be obvious. Not only this, but the gradual revision of the statutes itself will be of great assistance to the court in its duties. The attempt to patch onto the Statutes of 1898 the great volume of legislation which has been passed since that time has resulted in a very mountain of confused, involved, and contradictory statute law, which is not only difficult to be understood by the citizen and lawyer, but by the court as well. A thorough and concise revision would not only reduce this confused mass of law to reasonable limits, but also make it far more intelligible and certain in its application, and thus conduce to the more rapid and satisfactory performance of the duties of this court.

If these considerations do not demonstrate that within the prior decisions of this court the appointment of a revisor of the statutes should logically be held a duty which the legislature may rightfully commit to the judiciary, they seem certainly sufficient to leave the question doubtful; and if it be doubtful, then the inquiry whether there has been any long-continued, practical construction of the constitutional provision by the branches of the government affected thereby is not only proper but essential. Lawbreaking is none the less lawbreaking because it is grayheaded with age; but when the meaning of a doubtful clause is in question, the construction placed upon it by the fathers, and concurred in through long years

without question, is strongly persuasive and frequently will be held to be controlling. *State ex rel. Bashford v. Frear,* 138 Wis. 536, 120 N. W. 216. When I began the investigation of this subject historically I knew there were a number of precedents, but I had no idea of the number of them. For nearly thirty-five years the legislature has been committing appointments of this nature to the judges of this court or of the circuit court with power to fix compensation, and the judges have been performing the duties, the auditing department has been auditing the bills allowed, and the financial agents of the government have been paying them.

The first significant law of this nature is ch. 203 of the Laws of 1875, which authorized the justices of this court to appoint three competent persons to collect and revise the general laws of the state. This act provided that the revisers should receive such compensation for their services and for clerk hire as the justices of the court should deem just and reasonable, to be audited by the secretary of state upon the allowance of the justices. The act also authorized the justices to appoint other persons to fill vacancies in the board if necessary, and directed that they should first approve any printing ordered by the revisers. It will be seen that the act, while brief, covered all the essential features of the act now under consideration, except that the revisers were not to serve for any definite term nor was it specified that their compensation should be fixed in advance or called salary.

At the time this law was passed there were two constitution makers on this bench. Judge Cole had taken a conspicuous part in framing the constitution under which we live, and Judge Ryan had taken an even more conspicuous part in the convention which framed the rejected constitution two years earlier, which constitution contained the same general provision that judges should hold no other office, in nearly the same words. Judge Lyon, their colleague, had been speaker of the assembly in 1859, and had almost literally sat at the

feet of Gamaliel, so far as the constitutional history of the state was concerned. The question whether they should act under such a law was then a new one. It is inconceivable that they should have acted without considering whether the law was valid, and it is equally inconceivable that they could have acted unless they had decided in favor of its validity.

Reference to the records of the office of the secretary of state shows that on March 26, 1875, the justices sent a communication to that office in which they certify that "We, the justices of the supreme court, have this day appointed" David Taylor, William F. Vilas, and J. P. C. Cottrill as revisers under the law named. This order was signed by all of the justices named. It is well known that the work proceeded under this order and that the final result was the Revised Statutes of 1878. Before that consummation, however, the legislature and the court had taken further and even more significant action. It was feared that the work could not be accomplished so as to be ready for the legislature of 1878, and so ch. 298 of the Laws of 1877 was passed authorizing *the court* (if necessary in the opinion of the majority of the justices) to appoint not more than two additional members of the board of revisers and assign them their duties, and appropriating such sum as *the court* should deem a reasonable compensation for their services. It is to be noted that neither in this act nor the preceding one was any limitation placed upon the amount to be spent; the confidence of the legislature was evidently unbounded. It is further to be remarked that in the last act the power of appointment and allowance was vested in *the court* itself rather than in the justices.

Reference to the record again shows that *the court* acted in response to the last-named law, and by an order entered on the court minutes appointed J. H. Carpenter and Harlow S. Orton as additional revisers, giving them each a specific portion of the statutes as a field of labor and fixing the compensation of each in advance at $15 per day. If there were

doubt as to the conclusion reached by the justices on the question of the judicial character of this work after the making of the order appointing the first board, that doubt would certainly be removed by the action taken under the second law, where *the court* not only made the appointments, but fixed the compensation in advance. But this was not all. By ch. 3 of the Laws of 1878, passed at the extra session, the legislature directed the printing and publication of the new revision to be done under the supervision of two persons whom the justices of the supreme court should appoint, whose compensation, clerk hire, and necessary expenses should be fixed and allowed by the justices. Under this law the justices (then being five in number by the addition of Justices TAYLOR and ORTON) made and signed an order on June 21, 1878, appointing Wm. F. Vilas and J. H. Carpenter to act under the law, and fixed the pay of each at the sum of $400 per month during the time of their service. By this order they also named a standard volume in accordance with which the work was to be compared and executed, as provided by the act. It seems that it would be hard indeed to find words and acts which would more completely prove that both the legislature and the court then regarded the work of preparing and printing a revision of the statutes as work which was so far judicial in its nature that not only the work itself, but the amount of compensation of the actual workmen, either in advance or otherwise, might properly be committed to the justices of the court and even to the court itself.

The laws of the same general character which have followed this law will now be named, and their general features given, without however going so greatly into detail. By ch. 116 of the Laws of 1876 the law library was placed in the hands of the justices and the attorney general, under the name of trustees of the library, and the duties of selecting the books to be purchased, as well as the rules to be observed in their use, committed to them. By sec. 368 of the Revised Statutes of

1878 the same officials, under the name of trustees, were given power to appoint and remove the librarian, approve his bond, and certify to the prices of the books purchased. All of these duties have been discharged from time to time without question as to their legality, from that time until the present.

By ch. 252 of the Laws of 1882 the justices were authorized to appoint two members of a board of commissioners who superintended the construction of the new wings to the old capitol. As one of these wings was to contain the court and library it was evidently deemed fitting that the court should have some representatives on the board. By ch. 63 of the Laws of 1885 the court was authorized to appoint commissioners to examine applicants for admission to the bar and to fix and allow their compensation, not exceeding a certain amount *per diem*, as well as their necessary expenses. This law has been acted on ever since that day and is still in active and successful operation.

By ch. 389 of the Laws of 1887 the legislature made another very significant delegation of the appointing power. By this chapter the justices were authorized to appoint three persons, one of whom was to be the attorney general, to draft a general charter law for cities, and to fix their compensation not exceeding a certain sum, as well as approve the printing required by the commissioners. Here again was a recognition of the fact that codification of the statutes, even of a small portion thereof, was considered within the judicial field and hence properly a subject of action by the judiciary. The justices promptly acted on this law, and the work was done and resulted in the general charter law which, with amendments, is still upon our statute books. The pay of these commissioners, within the modest maximum fixed by the legislature, was allowed by the justices of this court, as Mr. Justice MARSHALL, who was on that commission, can personally testify.

Again, by ch. 379 of the Laws of 1897 two of the justices were required to examine the new revision, then nearing com-

pletion, and certify that the provisions of the acts authorizing the revision had been complied with before its publication, and this duty was performed, as appears from the published certificate at the end of the revision of 1898.

By ch. 435 of the Laws of 1903 *this court* was authorized to appoint a board of five commissioners to redistrict the judicial circuits of the state and file their report with the clerk of this court. That commission was appointed by *this court* July 3, 1903, Mr. John B. Simmons, of Racine, being chairman, and made and filed their report with a proposed bill, which report and bill were sent by the clerk to the legislature of 1905. The bill, however, was not passed.

In the year 1903, the accommodations of the supreme court and the library having become much too small and congested for the volume of business transacted by the court, the legislature, by ch. 399 of the laws of that year, authorized the justices to nominate, and the governor to appoint, one of their own number as a member of a commission to obtain and adopt a plan for additions to and changes in the capitol, in order to properly accommodate the law library and the court. The writer was nominated and appointed under this law, and the governor also appointed Mr. Justice MARSHALL on the board. Both acted, and did so upon the basis that they were performing simply a temporary duty, vitally connected with the proper transaction of the duties of the court, and hence proper for a justice of this court to perform, and were not accepting another office.

By a number of laws passed at various times the justices have been authorized by the legislature to appoint the supreme court reporter, also to appoint and fix the compensation of a proofreader and other help in the reporter's office, also stenographers and copyists to assist the justices personally. By other acts the trustees of the library have been authorized to appoint and fix the salaries of an assistant librarian and other necessary clerical help in the librarian's office, also the additional help necessary to install a card index in the library, and

all of these provisions have been acted on, and are being acted on today. See the following laws: Secs. 346, 346*a*, S. & B. Ann. Stats. (1889); ch. 187, Laws of 1895; ch. 245, Laws of 1897; ch. 328, Laws of 1899; ch. 466, Laws of 1907; and ch. 206, Laws of 1909.

By ch. 323 of the Laws of 1909 the circuit judge is authorized to appoint and remove at pleasure in each county "divorce counsel," who is required to take the constitutional oath of office, and seems to approach very closely to the position of a county officer.

Doubtless other laws could be cited along the same general lines—my own examination necessarily has been somewhat hurried,—but enough have been cited to show that for nearly thirty-five years all departments of the government, executive, legislative, and judicial, have persistently and continuously construed as valid laws substantially similar to the revisor law.

I note the objection that the state library law endows the justices with another public office not judicial, namely, that of trustees of the state library, in violation of the constitution, which says that they shall hold no office of public trust during their term except a judicial office. There have been many attempts to accurately define an office and differentiate it from a mere employment, but it is manifest that the line is not easy to draw. In *Hall v. State,* 39 Wis. 79, Justice LYON said:

"When public functions are conferred by law upon certain persons elected by the people or appointed by the legislature, if those functions concern the general interests of the state, and are not of a nature merely local or temporary, such persons are public officers, especially if they are paid a salary for their services out of the public treasury."

The doctrine is well-nigh universal that the duties must be continuous and permanent, and not merely transient, occasional, or incidental. *State ex rel. Brown Co. v. Myers,* 52

Wis. 628, 9 N. W. 777; *U. S. v. Germaine,* 99 U. S. 508; *State ex rel. Lewis v. Board of Pub. Works,* 51 N. J. Law, 240, 17 Atl. 112; 6 Words & Phrases, 4925, 4927; *U. S. v. Hartwell,* 73 U. S. 385.

With these principles in mind let us consider the nature of the duties of the trustees and the evident intent of the legislature. *First,* it is to be noted that they are not expected or required to take any oath of office. They become trustees by virtue of their official character as justices, and remain trustees only during their incumbency. The constitution (sec. 28, art. IV) requires all officers to take the constitutional oath of office unless by law exempted. *Second,* their duties are only occasional and temporary. The appointment of a librarian or an assistant, the promulgation of rules, and the determination as to the books to be purchased, and approval of occasional bills comprise the duties; and it must be apparent to any one that weeks and months must frequently elapse between the occasions when any of these acts are to be performed. If the legislature had said that the justices of the supreme court should have power to appoint a librarian and his assistant when necessary, and that they should from time to time determine the number of books to be purchased and fix their prices, there would be no claim, I apprehend, that the legislature had attempted to confer upon the justices another office, but at the most a claim that the duties were not judicial in their character. The law in question adds nothing to the supposed situation except that it calls them "trustees." This is significant, perhaps, but not conclusive. The inference is persuasive, I think, from the whole tenor of the act, that the appellation "trustees" was inserted as matter of convenience and to avoid the frequent repetition of the titles of the officials. This becomes rather more apparent when the original act creating the library (ch. 352, Laws of 1851) is considered. By this act the governor, secretary of state, and superintendent of public instruction were made *ex officio*

trustees. This act was entitled "An act to provide for the superintendence of the state library, for the purchase of books for the same and for other purposes." Practically all that the trustees were authorized to do was to make rules for the superintendence and care of the library, fix the salary of the librarian, and report to the next legislature the books in it. The governor was given the power to appoint the librarian and purchase all the books. It would seem almost farcical to call this original trusteeship an office; it is plainly nothing more than an imposition of an occasional and merely temporary duty on officials already existing. The present law has simply grown out of that original law, the justices and the attorney general being substituted as trustees in 1876. But while the occasional duties of the "trustees" have been somewhat increased there has been no indication that these duties were supposed to constitute them officers any more than the original trustees. The trustees have never received salary or compensation of any kind, and their legal right to act in this capacity was recognized by way of argument and illustration in *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475, where it was said that it rested upon the same principle which justified legislation giving courts and judges the power to select necessary assistants. Viewing the law as it stands, and its long history, the utmost that could be said, were the question new, is that it is a matter of doubt whether an office was intended to be created or not. If this be the correct view, then it seems to me unquestionable that the doubt has been set at rest long ago by the construction placed upon the law continuously since 1876 to the present moment—a construction which commenced when two constitution makers, revered for their learning and probity, were still upon the bench. If I err in my conclusions, I am content to err in such reverend company as this.

I note another objection to the law, to the effect that the fixing of salaries is exclusively a legislative power which

cannot be delegated to a court. Two cases are referred to as sustaining this position, viz.: *Smith v. Strother,* 68 Cal. 194, 8 Pac. 852, and *Madison v. Madison G. & E. Co.* 129 Wis. 249, 108 N. W. 65. The first of these cases explicitly lays down the proposition that the fixing of the salary of even a court reporter, in advance, is a legislative act which cannot be delegated to a court. The decision is based simply on the well-understood rule that a judicial act determines what the law is and the rights of the parties are as to past transactions; a legislative act provides what the law shall be in future cases arising under it. The second of the cases cited holds that the fixing of rates to be charged by public utilities in the future is a legislative, not a judicial, act, and cannot be done by a court. This holding is based upon the principle that to prescribe rules for the future is a legislative act, but to inquire whether legal rules have been violated in the past is a judicial act. There is no quarrel with this abstract proposition. It is frequently stated in these or similar terms and is a correct general statement. It does not mean, however, that a court or judge can never do anything except decide whether the law has been violated in the past, nor that a legislature must spend all its time passing laws for the future. If the proposition included everything that a court or judge could do, then it would be impossible for a court to appoint a bailiff to keep order, or make rules for the conduct of business. As we have already seen, a court may properly be given power to provide for the doing of such administrative acts as are necessary and proper to enable it to satisfactorily perform its purely judicial duties, and may, under legislative sanction, appoint necessary or proper officers and agents for those purposes. *State ex rel. Gubbins v. Anson, supra.* Now, if this be conceded, it seems illogical to say that the power to fix compensation or salary in advance may not accompany the power of appointment. The power of appointment is doubtless given because it is deemed that it will be best exercised by the court, since

the duties affect the conduct of judicial business, and the judges may be supposed to have better knowledge of the qualifications of possible appointees. But if not accompanied with the power to fix a salary in advance, it might well be that the purposes of the law would be defeated, either because the desired appointee would not accept the compensation fixed by the legislature, if one be fixed, or would be unwilling to work without knowing in advance what he was to receive. With all due respect to the supreme court of California, it seems clear that in *Smith v. Strother, supra,* that court misinterpreted and misapplied a correct general principle. The principle that courts are only to determine what the law has been and is, and not what it is to be in the future, controls a court in the performance of its strictly judicial duties as a decider of controversies; but it is manifestly illogical, as it seems, to apply it to administrative acts or functions which it is necessary for the court to perform through agents or employees, in aid of its purely judicial duties. I say illogical, because if the rule does apply to these last-named functions, then no court or judge could give any directions to the clerk, or stenographer, or bailiff, or other employee, as to his duties or conduct in the future, but must be confined to reprimand and punishment for past acts, in the hope that ultimately and through much tribulation the employee will learn his duties. If the court may not be authorized to fix the pay in the future it would logically follow that it may not be authorized to fix the duty in the future. Both acts offend against the principle that the court must simply apply the law to past acts, if either does.

But we are not without authority in this matter. This court has decided the question in the learned and eloquent opinion written by Chief Justice DIXON, just before he left this bench, in vindication of the power and right of the court to have a bailiff of its own choosing, rather than an employee sent here by the executive department. In this case not only was the inherent power of the court to appoint its bailiff de-

clared (reaffirmed in *Stevenson v. Milwaukee Co.* 140 Wis. 14, 121 N. W. 654), but it was distinctly determined that his pay in the *future* was to remain the same as in the past, and further it was rather defiantly stated that if the legislative branch of the government neglected to make the necessary appropriation for the bailiff's salary he would have his action therefor against the state. *In re Janitor of Supreme Court,* 35 Wis. 410. By virtue of that judgment, the respected and faithful officer of the court, named in that opinion, has retained his position and rendered valuable service to the state from that day to the present. Here was a fixing of salary in the future, not only when the legislature had authorized it, but even when the legislature had not acted. Of course the court could only fix a salary of its own motion when the officer is an absolutely necessary one, whom the court has inherent power to appoint and where the legislature has failed to fix his pay (*Stevenson v. Milwaukee Co., supra*); but the case is a clear adjudication that the power to fix the salary of an inferior court assistant is not purely legislative. If the court can fix in advance the salary of one administrative employee it may certainly be authorized by the legislature to fix in advance the salaries of others. The fact that one is an absolutely necessary employee and the others are merely helpful assistants, created by legislative will, cannot make any difference with the quality of the act of fixing a salary in advance.

We have already seen that in 1877 *this court,* by order entered on the minutes, appointed two additional revisers and fixed the pay of each in advance at $15 per day, while in 1878 the justices appointed two superintendents of printing and fixed their pay in advance at $400 per month. At least twice, therefore, the court has formally spoken on this matter; and following these precedents, the justices, either acting individually or together, have fixed salaries of employees of the court and library on very many occasions. In Kentucky it has been held that the power to fix the salaries of county officers

in advance may properly be conferred upon courts. *Stone v. Wilson,* 39 S. W. 49, 19 Ky. Law Rep. 126. The same doctrine is laid down in Minnesota with reference to the county attorney, because he might properly be considered as a *quasi*-officer of the court. *Rockwell v. Fillmore Co.* 47 Minn. 219, 49 N. W. 690. So far as Wisconsin is concerned, the question of the power of the legislature to delegate to courts or judges the right to appoint assistants and other officers to perform acts of an administrative character in aid of the court's judicial functions, and to fix the salary of such assistants or officers, seems settled both by direct decision and by long-continued practical construction. It seems hardly necessary to look for outside authority on the subject, yet it is interesting to take a glance afield and see what has been held in other jurisdictions.

It is believed that all of the state constitutions divide the powers of government into the three great departments, and many, if not most, of them contain a provision inhibiting judges from holding any other office. It would naturally be expected that the question of the validity of laws delegating the appointing power to courts and judges must frequently have arisen, and such in fact is the case. In an extensive note to our own case of *Foster v. Rowe,* 128 Wis. 326, 107 N. W. 635, reported in 8 Am. & Eng. Ann. Cas. 595, the authorities are collated practically up to the present time. From this note it appears that such laws have been held valid in the states of Alabama, California, Colorado, Georgia, Illinois, Indiana, Kentucky, New Jersey, New York, Oregon, Pennsylvania, Texas, West Virginia, and Wisconsin, besides which the same holding has been made in some of the lower federal courts. While the note cites very many cases supporting this doctrine, I will content myself here with simply citing one case from each of the states named, viz.: *Fox v. McDonald,* 101 Ala. 51, 13 South. 416; *Staude v. Board of Election Comm'rs,* 61 Cal. 313; *People ex rel. Rhodes v. Fleming,* 10 Colo. 553, 16 Pac. 298; *Russell v. Cooley,* 69 Ga. 215;

People ex rel. Longenecker v. Nelson, 133 Ill. 565, 27 N. E. 217; *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 174, 46 N. E. 77; *McArthur v. Nelson,* 81 Ky. 67; *Ross v. Essex Co.* 69 N. J. Law, 291, 55 Atl. 310; *Allison v. Welde,* 172 N. Y. 421, 65 N. E. 263; *Walker v. Cincinnati,* 21 Ohio St. 14; *State ex rel. v. George,* 22 Oreg. 142, 29 Pac. 356; *Comm. ex rel. v. Collier,* 213 Pa. St. 138, 62 Atl. 567; *State ex rel. v. Manlove,* 33 Tex. 798; *State v. Mounts,* 36 W. Va. 179, 14 S. E. 407.

Some of the numerous cases cited in the note go upon the exact ground stated in the *Anson Case,* namely, that the appointees are assistants or employees of the court; some upon the ground that the duties to be performed were of a judicial nature in themselves, such as the duties of election commissioners, who hear evidence and decide whether the judges of election have improperly refused registration to voters, or the duties of commissioners to settle matters of indebtedness between counties; but a third and large class go upon the broad ground that the power of appointment to office does not necessarily or ordinarily belong to either the legislative, executive, or judicial department alone, but that in the absence of constitutional inhibition it may be exercised by the people or by the legislature or committed by the legislature to the executive or judicial department, or even to third persons with no official position, and that it is an executive function when committed to the executive, legislative when committed to the legislature, and judicial when committed to the judiciary. This latter doctrine is stated as the law in a very long and learned note to the case of *People ex rel. Waterman v. Freeman,* 80 Cal. 233, 22 Pac. 173, reported in 13 Am. St. Rep. 122, and is thus clearly stated in *Ross v. Essex Co.* 69 N. J. Law, 291, 55 Atl. 310:

"An examination of our constitutional and legislative history will dissipate the idea that the power of appointing to office is the peculiar property of any one of the three departments of our government."

It is further stated in the first note above referred to that in the following states such statutes have been held unconstitutional, viz.: Iowa, Maryland, Michigan, Massachusetts, and Minnesota, and possibly one or two others. In Iowa the officers were municipal waterworks trustees (*State ex rel. White v. Barker,* 116 Iowa, 96, 89 N. W. 204); in Maryland jail visitors (*Beasley v. Ridout,* 94 Md. 641, 52 Atl. 61); in Michigan surveyors for locating and building drains (*Houseman v. Montgomery,* 58 Mich. 364, 25 N. W. 369); in Massachusetts supervisors of election (*Case of Supervisors of Election,* 114 Mass. 247); in Minnesota members of a local board of county control (*State ex rel. Young v. Brill,* 100 Minn. 499, 111 N. W. 294, 639). But in Massachusetts the power to appoint commissioners to assess benefits and damages in laying out highways has been held proper to be given to a court because they have judicial functions (*Salem T. P. & C. B. Co. v. Essex Co.* 100 Mass. 282); and in Minnesota the power to appoint title examiners under the Torrens system was held properly given to the court on the ground that the examiners are assistants of the court (*State ex rel. Douglas v. Westfall,* 85 Minn. 437, 89 N. W. 175). Thus these two states appear to be in harmony with the *Foster* and *Anson Cases;* and in Iowa it is expressly recognized that if the power to be exercised is judicial in its character or in aid of judicial functions, it is proper to delegate the appointment of an officer to exercise the power to a court. *State v. Barker, supra.*

It is not to be understood, by reason of the omnibus citation of the authorities marshaled in the note to *Foster v. Rowe,* that they are all approved. Especially is it not to be understood that the cases holding the broad doctrine that any appointment of any kind which is authorized by the legislature may be vested in a court. It is not necessary to go further, and we do not go further, than was gone in the *Anson Case,* namely, to hold that where the officer or employee is to act in an administrative way as an aid, even though indirectly, to

the court in the performance of its functions, his appointment may rightly be delegated to a court or judge, and such delegation is not an invasion of executive power; nor is the fixing of his salary in advance an invasion of legislative power; nor does the judge who makes the appointment thereby attempt to hold another office. We cite the note and the authorities under it, however, as evidence of the apparently great preponderance of authority not only in favor of the validity of such legislation as is before us, but of legislation which goes much farther and authorizes courts to appoint such officers as election commissioners, police commissioners, park commissioners, trustees for the construction of a subsidized railroad, tax collectors, school commissioners, bridge commissioners, commissioners to borrow money and sell bonds, and numerous other officials and agents who neither aid the court in its duties nor act judicially.

Recurring for a moment to the question of the legal propriety of the justices of this court acting as so-called trustees of the law library, it is noted that in California, under a constitution forbidding the exercise by the judiciary of powers belonging to other departments, it has been held that a statute making the chief justice *ex officio* a member of the library board was invalid because the powers were strictly executive and not judicial. *People ex rel. Simmons v. Sanderson,* 30 Cal. 160. Whether the library was miscellaneous or legal does not appear from the report of the case and the reasoning of the case is not persuasive. It is further to be noted that in the state of Nebraska since 1871 the judges of the supreme court constitute the board of directors of the state law library, with power to make rules for its use and direct the purchase of books, and that the *supreme court* is authorized to appoint the librarian. Cobbey's Ann. Stats. 1903, §§ 586, 7052–7060. This law seems never to have been questioned, and it is deemed likely that investigation would show that other states have adopted the same plan.

The result reached is that the duties imposed by ch. 23, Stats. (1898), with reference to the state library, as well as the duties imposed by ch. 546 of the Laws of 1909 (secs. 116, 117, Stats.), with reference to the appointment of a revisor, etc., must be considered as ministerial or administrative duties, which may properly be imposed upon the judiciary because they are either helpful or necessary in the performance of the purely judicial duties of the court.

As to the purchase of copyrights under ch. 547, Laws of 1909, no decision has yet been reached. When it becomes necessary to decide whether the judges may properly be required to act as purchasing or business agents of the state and to spend a relatively large fund in buying property, and thus make contracts out of which litigation may easily arise, the question will be given that serious attention which it deserves, and until that time no opinion thereon is intimated.

I do not think that any of the justices of this court are greedy for power, least of all for the appointing power; and the writer speaks from personal knowledge when he says that he does not desire to assume labors in addition to the ordinary duties devolving on a justice of this court in the hearing and determination of actions at law. In these latter labors he finds opportunity to give all his powers full exercise, and he has not been conscious of any yearning for other worlds to conquer. He desires, however, as he believes all his colleagues desire, to discharge in full measure the duty which is owing by a justice of this court to the people of the state by virtue of his election to an important office and by virtue of the obligations of his oath of office. He would break that oath just as culpably by refusing to perform a duty which his judgment tells him is legally imposed on him as by performing an act which he deems that the constitution forbids him to perform.

I am authorized to state that Justices MARSHALL, DODGE, and BARNES concur in the conclusions reached in this opinion.

SIEBECKER, J. (*dissenting*). Ch. 546 of the Laws of 1909 creates and adds two new sections (secs. 116 and 117) to the statutes of the state. The title declares that it is an act "relating to the revision of the statutes, and making an appropriation." It provides for the appointment of a revisor of the statutes, to be known as "revisor," and that his appointment shall be made by the trustees of the state library "upon the passage of this act, and thereafter on and after the third Wednesday in January of each year in which the legislature shall meet in regular session." When the justices undertook compliance with this law I participated in their action, and I did not examine into the validity of the law until the question was raised by one of the justices. In my opinion this challenge to the validity of the legislation raises the question of its constitutionality and presents to the members of this court the twofold inquiry: Is this law constitutional, and, if it be valid legislation, are the justices of this court obligated to perform the duties imposed by the law?

The chief justice, in an exhaustive and comprehensive opinion, has collated the different legislative acts, from the time of the adoption of the state constitution to this day, whereby various duties have been imposed on the justices of this court by the legislature, and has collected the decisions of this court bearing on the subject. I am in accord with the view expressed therein to the effect that our constitution manifestly recognizes the doctrine of the division and separation of governmental powers into legislative, executive, and judicial departments; that their execution is lodged in these co-ordinate departments of the government, which are independent each of the other in executing their respective powers; and that neither can assume to encroach upon the field of another without invading this fundamental doctrine of the separation of these sovereign powers. I also concur in the principle that "when in the execution of their proper duties it becomes necessary or proper for either the legislative or judicial depart-

ment of the government to have administrative acts performed by assistants, such assistants may properly be selected by the legislature or the judiciary, as the case may be, provided the constitution does not otherwise direct." This is the effect of the decisions of this court in *In re Janitor of Supreme Court,* 35 Wis. 410, and *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475. It is within this principle that the duties prescribed by secs. 367 to 372, Stats. (1898), inclusive, appertaining to the management of the state library, and the duties imposed by sec. 346, Stats. (1898), respecting the appointment of a reporter for editing the decisions of this court, are properly imposed on the justices of the supreme court in their official capacity. So far as the administration of the affairs of the state library and the appointment of a librarian and of a person to report and publish the decisions and opinions of this court, as well as the appointment of their assistants and other helpers for the performance of these acts, are committed to the justices by these statutes, it seems clear to me that the law makes them the agencies of the state for the proper execution of the duties devolving on the judicial department of the state, and that it calls on them to perform administrative acts which are necessarily connected with the administration of the state's judicial affairs. The incumbents of these positions, thus selected by the justices, are in my opinion performing ministerial functions as assistants of the court, and the power of appointing them is a duty properly lodged in the judicial department of the government. The acts heretofore performed in execution of these statutes by the trustees or by the president and secretary of the board at the direction and command of the members, I regard as fully justified and as fully within the scope of the judicial branch of the government, though the legislature has by statute created the occasion calling for their performance.

I am unable to concur in the opinion of the justices as ex-

pressed in the opinion of the chief justice that the revisor to be appointed under ch. 546 of the Laws of 1909 is an administrative officer engaged in the performance of acts connected with the judicial department of the state government. The act provides that the revisor shall prepare a loose-leaf set of the statutes in force, arranged in sections, that he shall designate the titles and subtitles under which they are indexed, and that he shall keep an appropriate card index thereof; that he shall keep and maintain notes of court decisions referring to the statutes; that he shall supervise a compilation of such statutes, subject to the trustees' approval, and attend to the printing thereof and of such portions as may be ordered for the use of any department of the state; that he shall prepare and keep a loose-leaf record of laws which have been repealed, amended, or superseded by subsequent enactments; and that he shall keep these records in duplicate in the state library. This chapter also makes it the duty of the revisor:

"To formulate and prepare a definite plan for the order, classification, arrangement, printing, and binding of the statutes and session laws, and between and during sessions of the legislature to prepare and at the beginning of each session of the legislature to present to the committee on revision of each house, in such bill or bills as may be thought best, such consolidation, revision, and other matter relating to the statutes or any portion thereof as can be completed from time to time."

I am unable to discover that any of these acts are administrative acts connected with the execution of the judicial power of the state. From their very nature it is manifest that these services pertain to and are part of the execution and administration of the legislative branch of the government. True, when the revisor's duties have been performed, the result may be materially adapted to aiding the court in performing its duties; but I perceive no difference in the product of his work and the same thing done by a legislative committee respecting the compilation, codification, and annotation of laws and their

publication in convenient and serviceable form, which I take it could not in any sense be regarded as connected with the administrative functions of the judicial department. They are obviously administrative acts connected with the execution of functions pertaining to the legislative branch of the government. I consider, therefore, that the duties imposed on the revisor by ch. 546 of the Laws of 1909 are unrelated to the proper execution of the duties of the judicial department and that he cannot be appointed as its administrative officer to aid in the administration of the judicial affairs of the state.

In this view of the nature of the revisor's duties, thus sought to be imposed, the inquiry arises: Can the legislature impose his selection and appointment on the justices of this court, as *ex officio* trustees of the state library, he being an officer charged with legislative duties? This presents the questions: (1) Is he an officer or employee of the state whose appointment can be delegated by the legislature? (2) Can the legislature, as provided by the terms and conditions of the statute, delegate the function of fixing the amount of his compensation? (3) Does the constitution inhibit the justices of this court, in the capacity of *ex officio* trustees of the state library, from performing the duty of selecting him for an office of the state?

Respecting the first of the above inquiries, it seems to me that under ch. 546 of the Laws of 1909 the revisor is an officer within the usual and accepted meaning of the term, because this law imposes a special trust and charge on him and he acts as an agency of the state for performing specific duties for the benefit of the public. The law also prescribes that the incumbent shall receive a compensation and hold the position for a specified term. In addition to imposing the duty on the trustees of selecting this officer, it requires them to fix his compensation, remove him for cause deemed sufficient by them, to approve his appointments of assistants, clerks, and stenographers, and to approve their compensation. In my

judgment, these duties, so imposed on the trustees by this statute, are different in their nature and more extensive in their scope than those imposed by the law as it theretofore existed and which appertained to the management of the state library and the appointment of a librarian, a reporter, and their assistants. To charge the trustees of the state library with all these duties for the benefit of the state converts the trusteeship into an office of public trust for carrying into execution a part of the functions of the state. It pertains to powers and duties which do not inhere in the judicial department, and the law thus imposes on the justices of this court an office of the state such as is prohibited by sec. 10 of art. VII of the state constitution, providing that "the judges of the supreme court . . . shall hold no office of public trust, except a judicial office, during the term for which they are respectively elected." Manifestly, this inhibition does not include such functions as the administration of the affairs of the state library and of the reporter's department, which are connected with the execution of duties for the state which are related to the carrying into effect of the judicial power. This act attempts to impose such duties on the members of this court, as *ex officio* trustees of the state library, as makes the trusteeship an office of public trust of such a character as the justices are prohibited from holding by the constitution.

In my judgment the practical construction given to prior legislation cannot control in testing the validity of the law embodied in this chapter and in ch. 547 of the Laws of 1909, because this legislation attempts to impose duties and functions on the trustees of the state library of a public character which are materially different from those imposed by any prior legislation. The legislature manifestly adopted ch. 547 of the Laws of 1909, authorizing "the trustees of the state library to purchase certain copyrights and rights to annotations to the statutes," as a part of a scheme which led to the adoption of ch. 546 of the Laws of 1909. These chapters were

approved at the same time and their contents refer to the same subject matter. When thus considered together, the conclusion that they deal with a subject unrelated to the judicial department of the government is emphasized. These considerations lead to the conclusion that these acts attempt to impose duties and functions on the justices of this court, as *ex officio* trustees of the state library, which are nonjudicial in their character and purely administrative acts not necessarily or properly connected with the execution of the judicial power, and obviously imposed by the legislature on the members of this court as *ex officio* trustees of the state library. To assume these duties is in my opinion to hold an office of trust pertaining to a matter outside of the judicial branch of the government. This is in conflict with the provisions of sec. 10 of art. VII of the state constitution and renders the legislation invalid. If this were the opinion of the majority of the justices no further action for the appointment of a revisor could follow. Since, however, the majority of the justices are of the opinion that ch. 546 of the Laws of 1909 is valid, I shall deem it, for the present purposes, an interpretation of the law of the state. Under these circumstances, I shall participate in the performance of the duties and functions imposed by this statute on the members of this court and accordingly shall act in executing the provisions of the statute.

Upon the question of whether the legislature had the power to delegate the selection of a revisor, I regard sec. 9 of art. XIII of the state constitution as applicable and decisive. It provides:

"All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct."

As I have stated, the functions of the revisor, as imposed by this statute, make him an officer of the state within the contemplation of law. His appointment can be delegated by the

legislature under this constitutional provision to such an appropriate agency as is not prohibited by the constitution and laws from executing such a legislative mandate. Since, however, the justices of this court are disabled from performing any function for the state in the nature of an office of public trust, the duty must be imposed on some agency other than the members of this court.

As regards the power of the legislature to delegate the authority to fix the revisor's compensation for his services, I think the law attempts no more than to authorize the appointing power to ascertain facts and circumstances respecting the value of the revisor's services as imposed by the law and to determine such amount within the prescribed limit. This does not impress me as a delegation of legislative power, but as an act done for the legislature which is administrative in its nature and which the legislature may properly delegate.

These observations cover my views respecting the appointment of a revisor under ch. 546 of the Laws of 1909.

KERWIN, J. I concur, substantially, in the views expressed by Mr. Justice SIEBECKER in the foregoing opinion.

TIMLIN, J. (*dissenting*). Ch. 546, Laws of 1909, provides that upon the passage of that act, and thereafter on or after the third Wednesday in January in each year in which the legislature shall meet in general session, the trustees of the state library shall appoint a revisor of the statutes to be known as "revisor." The revisor and his assistants shall be subject to removal at any time by the trustees for any cause deemed sufficient by them, and upon any such removal the trustees may appoint a successor to such revisor or assistant. Subject to such removal for cause, the revisor so appointed is to hold his office for two years and until his successor shall have been appointed and qualified. How he shall qualify is not specified; therefore he must qualify under sec. 28, art. IV,

Const. Subject to the approval of these trustees the revisor may appoint such assistants, clerks, and stenographers as may be necessary and fix their compensation. The duties of the revisor are then set forth, among which are:

"To formulate and prepare a definite plan for the order, classification, arrangement, printing, and binding of the statutes and session laws, and between and during sessions of the legislature to prepare and at the beginning of each session of the legislature to present to the committee on revision of each house, in such bill or bills as may be thought best, such consolidation, revision, and other matter relating to the statutes or any portion thereof as can be completed from time to time."

Other duties are to keep and maintain in the state library in duplicate a loose-leaf set of statutes with paragraphs of section or section numbers and an alphabetical card index referring thereto, notes of court decisions, index of the statutes whenever ordered by the legislature, etc. The revisor whose office is thus created is a permanent state officer holding for a specified term and until his successor is appointed and qualifies, and exercises large powers in aid of the legislative branch of the state government and also large powers of appointment. His work resembles that of an ordinary legislative committee. The trustees of the state library are from time to time to determine the salary of this office and fix the compensation of assistants, clerks, and stenographers, fill the office at the expiration of the term, remove and reappoint as above indicated. The duties of the trustees in this matter of appointment, in fixing salaries, removals, and reappointment are also permanent and continuous, devolving upon the board of trustees for all time thereafter.

By ch. 547, Laws of 1909, the same trustees are authorized to purchase all rights of publication of the statutes of this state, indexes thereto, and all annotations thereof, and all copyrights or other rights, together with complete annotations subsequent to the completion of the Supplement of 1906.

Fifteen thousand dollars is appropriated for the latter purpose.

At the time of the passage of these acts the "trustees of the state library" was an existing body or board consisting of the seven judges of the state supreme court and the attorney general of the state (sec. 367, Stats. 1898), and prior to the enactment of the statutes in question this board had certain duties imposed upon it by law, but none of the scope and extent now attempted to be conferred. I am however quite satisfied that some of the duties formerly imposed on this board were not such as judges of the supreme court ought to exercise. Pursuant to the acts in question the judges of the supreme court, under the thin disguise of trustees of the state library, are to appoint to this permanent office for a specified term, to fix the salary, to confirm the appointment of assistants, clerks, and stenographers, to remove the revisor or his assistants for cause satisfactory to them, to appoint others in their stead, to make new appointments from time to time at the expiration of the official term or in case of other vacancy, and to enter into negotiations for and make contracts of purchase for the state. No power of appointment heretofore attempted to be conferred upon the judges of this court, or upon this court, by the legislature has gone to this extent, nor do I think any American court has ever gone to the extent of upholding such a law, although there are many extraordinary decisions on this subject suggesting that the courts have not always applied to themselves the same strictness with reference to constitutional limitations as they apply to others. 66 Cent. Law J. 24–34. The constitution of this state (sec. 2, art. VII) provides that: "The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace." Sec. 3, art. VII: "The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only." Sec. 10, art. VII: "They shall hold no office of pub-

lic trust, except a judicial office, during the term for which they are respectively elected."

The constitution also in the usual form recognizes the division of governmental power into three departments, legislative, executive, and judicial, and provides (sec. 1, art. IV): "The legislative power shall be vested in a senate and assembly." Sec. 1, art. V: "The executive power shall be vested in a governor." Sec. 2, art. VII: "The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace." The legislation in question offends against the constitution in several particulars. Legislative power cannot be delegated to the courts. *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033. Fixing the salary of the incumbent of this office is an exercise of legislative power. *Madison v. Madison G. & E. Co.* 129 Wis. 249, 108 N. W. 65; *Smith v. Strother,* 68 Cal. 194, 8 Pac. 852. This seems to me incontrovertible because:

"In doing this the judge would be determining no right or obligation pertaining to person or property on facts already existing, but would be laying down a rule to be applied to a case the facts of which must afterwards transpire. As this would be an exercise of legislative power not expressly directed or permitted by the constitution to a court or judicial officer, the act must be declared unconstitutional."

Between a legislative act performed by a member of the supreme court openly as one of the court, or individually as a private person, or as one of the trustees of the state library there is no room for distinction. The legislature has no authority to delegate legislative power to the trustees of the state library. If the position of revisor were a temporary one to terminate when a particular act or undertaking was accomplished, or if he could be considered an officer aiding in the administration of the judicial functions, other questions might arise upon which I express no opinion. If the supreme

court judges can be authorized to fix the salary of this office, I do not see why they could not be authorized to fix the salary of every other officer whose salary is not fixed by the constitution nor by that instrument expressly committed to the determination of some other officer or branch of the government.

Again, with respect to the power of appointment of the legislative assistant called a revisor, the power of confirmation of his appointments of his subordinates, and the power of removal and reappointment, I consider these powers foreign to judicial duties or functions, and the attempt to confer them upon this court invalid as contrary to the plan of the constitution with reference to the division of governmental powers into three departments.

The same objection applies to the power of making contracts for the state for the purchase of all rights of publication of the statutes of this state now existing. These are not judicial duties and therefore not to be exercised by members of this court. See *State ex rel. Young v. Brill,* 100 Minn. 499, 527, 111 N. W. 249, 639, where the cases on this subject will be found collected.

I do not see how I could sit in judgment upon the legality of these salaries so fixed, these appointments so made or confirmed, or this contract of purchase, if I took part in making the appointments, fixing the salaries, approving the appointments of subordinates, or making the contract of purchase. I believe I have no right to disable myself from performing the duties of a judge of the supreme court. I do not think that as a judge of this court administering the law I should myself set the example of violating the constitution. I cannot imagine how, after participating in this breach of constitutional law, I could impartially sit in judgment upon other like breaches performed by subordinate judicial officers under the authority of similar unconstitutional statutes in the future.

Another grave consideration I think deserves mention. No

power exercised by officers of the government tends more strongly to draw these officers into the field of political intrigue and corruption than the power of appointment. For the honor of the American judiciary the courts, I think, should put aside the temptation to exercise this power. Excuses for or reasons justifying the exercise of this power of appointment in other cases forbid its exercise in the instant case. As in *State ex rel. Brown Co. v. Myers,* 52 Wis. 628, 9 N. W. 777, where it was said that commissioners of equalization are not officers within the meaning of the constitution; "they are merely appointed to do a specific act, and when that act is performed their power ceases," followed in *Foster v. Rowe,* 128 Wis. 326, 336, 107 N. W. 635. Or in *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475, where the power of appointment of jury commissioners by the circuit judges is upheld on the ground that the "machinery for obtaining such jurors with promptness and certainty and of suitable quality is so germane to the judicial function that there is no imposition of executive power in authorizing the courts, or the judges thereof, to select or direct such machinery."

A third ground of invalidity is that the judges of this court in performing the duties attempted to be imposed by the statutes in question as members of the board of trustees of the state library are holding and exercising an office of public trust other than a judicial office. It seems to me impossible to avoid the conclusion that members of an existing board upon which is conferred by statute the continuing power of appointment to this office, the power of fixing the salaries and the power of confirming the appointments of subordinates, and the power of removal and reappointment, are holding and exercising an office of public trust.

"An office is where, for the time being, a portion of the sovereignty, legislative, executive, or judicial, attaches, to be exercised for the public benefit." *U. S. ex rel. Boyd v. Lockwood,* 1 Pin. 359, 363; *Att'y Gen. v. Drohan,* 169 Mass. 534,

48 N. E. 279; *U. S. ex rel. Noyes v. Hatch,* 1 Pin. 182; *State v. Pederson,* 135 Wis. 31, 114 N. W. 828.

While there are cases like *Russell v. Cooley,* 69 Ga. 215, which is diametrically opposed to *Case of Supervisors of Election,* 114 Mass. 247, and which also inevitably led the Georgia court into that lawless condition illustrated in *Shreve v. Pendleton,* 129 Ga. 374, 58 S. E. 880, and in *Fox v. McDonald,* 101 Ala. 51, 13 South. 416, where it is ruled that the power of appointment to public office is an executive function when the statute has committed that power to the executive, a legislative function when the statute authorizes the legislature to act, and a judicial power when the statute authorizes the court to make the appointment, I cannot think that these decisions are correct, consistent with prior decisions of this court, or conformable to our state constitution. The New York cases, like *Striker v. Kelly,* 7 Hill (N. Y.) 9, reversed on another point in 2 Denio, 323; *Sweet v. Hulbert,* 51 Barb. 312; *Citizens' Sav. Bank v. Greenburgh,* 173 N. Y. 215, 65 N. E. 978; and *In re Rupp,* 28 Misc. 703, 59 N. Y. Supp. 997, while they might tend to uphold the statutes in question from one viewpoint, are conclusive against their validity so far as they attempt to confer the power to fix salaries, to confirm appointments, to remove appointees, to exercise these powers continuously, or to make contracts for the state. I am not convinced by the fact that the Wisconsin legislature has in many instances vested certain appointive powers in this court or in the circuit court. None of these instances cover the case at bar or approach it, in my judgment. The advisory office of practical construction of a constitution by other departments of government must, in the nature of things, be limited to the very case theretofore passed upon. Otherwise a single infraction of the constitution long acquiesced in might break down the whole instrument.

"Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution, and appointed judicial tribunals

to enforce it. A power is frequently yielded to because it is claimed, and it may be exercised, for a long period, in violation of the constitutional prohibition, without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the constitution." Cooley, Const. Lim. (7th ed.) 102–107; *Milwaukee Co. v. Isenring*, 109 Wis. 9, 27, 85 N. W. 131.

The legislative progress in this direction in our state rather impresses me with the view that it is high time to raise the constitutional objection to this class of legislation.

My objection to acting under this law is in no degree personal to the distinguished member of the bar who has received the appointment of revisor at the hands of the majority of this court. The objections here formally written out and spread upon the records were made by me long before his name was proposed for appointment or his appointment in any way considered. I must, however, with all due respect to the legislative branch of the state government, decline to act under the laws in question.

MILWAUKEE LUMBER COMPANY, Appellant, vs. CITY OF MILWAUKEE and another, imp., Respondents.

November 15, 1909—February 22, 1910.

Liens for materials, etc.: Subcontractors: City of Milwaukee: Statute construed.

Where a subcontractor for work for the city of Milwaukee is not an assignee of the principal contractor and has no right to look to the city for his pay, one furnishing materials to such subcontractor is not entitled to a lien under ch. 261, Laws of 1882, upon any sum due from the city to the principal contractor or upon any certificates of indebtedness or city orders issued to such principal contractor.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to recover indebtedness to plaintiff of defendant N. Schneider, on account of material furnished the latter by the former in executing a contract made by Schneider to perform for the *Strobel Steel Construction Company* a part of its contract with defendant city, represented by its board of public works, and, under ch. 261, Laws of 1882, to obtain a lien for the amount of such indebtedness on any sum due the principal contractor from the city and on any evidence of indebtedness issued therefor to it, and, in general, to enforce plaintiff's claim out of money earned by such principal under its said contract with the city. Such principal and the city were made defendants with Schneider.

Issues were raised as to whether, under the law aforesaid, plaintiff, as a creditor of a subcontractor, could enforce his claim against dues from the city to the principal contractor. Indebtedness to plaintiff from the subcontractor of $5,329.21, and all conditions requisite to enforcement thereof under the law of 1882, were established, if the claim be of the class provided for by such act.

The court made findings, embodying the Schneider contract, showing that it was a mere subletting of part of the work covered by the principal contract, and also embodying the principal contract, which prohibited assigning or subletting the whole or any part thereof without consent of the board of public works, and was expressly made subject to the law of 1882 aforesaid. Proof was not made that the subletting was consented to by the board, nor that the contract with him was expressly made subject to the principal contract as to the law of 1882, nor that it gave Schneider a right to resort to any one for his pay except the construction company.

In this situation the court held, as matter of law, that Schneider was not an assignee of the construction company

nor a contractor with the city in any sense; that he had no right to look to any one for his pay except the construction company and, therefore, that plaintiff's claim was not within the law of 1882. Judgment was rendered for defendants dismissing the action, and with costs in favor of the construction company.

Plaintiff appealed as regards the judgment in favor of the city and the construction company, but not as to the debtor Schneider.

For the appellant there were briefs by *Boden & Beuscher,* and oral argument by *F. X. Boden.*

For the respondent *Strobel Steel Construction Company* there was a brief by *Winkler, Flanders, Bottum & Fawsett,* attorneys, and *James G. Flanders,* of counsel, and oral argument by *C. E. Monroe.*

The following opinion was filed December 7, 1909:

MARSHALL, J. We cannot perceive any escape from the conclusion of law upon which the judgment is grounded. The act of 1882 [Laws of 1882, ch. 261] is so plain as not to be open to construction. Here is the language:

"Any person . . . that shall hereafter furnish supplies or materials for the use of the contractor or contractors or of his or their assigns, in the performance of any contract made with the board of public works of the city of *Milwaukee,* in the name of said city, or that shall do any labor for such contractor or contractors or for his or their assigns in the performance of any such contracts, shall have a lien," etc., upon any certificates of such board and upon any city orders of said city to be issued and delivered to such contractor or contractors or his or their assigns under such contract.

Thus it will be seen that, as a condition precedent to there being a lien, there must be an indebtedness of the city and certificates of the board of public works or orders issuable to the creditor. The agreement between the principal contractor and Schneider did not contemplate that. The latter was com-

petent to look to the former, only, for pay. Certificates of indebtedness or city orders were issuable, only, to the debtors of Schneider. That the law has no application to such a case as this, is too plain for reasonable controversy

By the Court.—Judgment affirmed.

A motion for a rehearing was denied February 22, 1910.

LIEBERMAN, Respondent, vs. WEIL and another, Appellants.

December 7, 1909—February 22, 1910.

Master and servant: Compensation: Contract of employment construed: Discharge: Dissatisfaction: Good faith.

1. By a contract with a traveling salesman his employer agreed to pay him a certain commission on cash collected on sales made by him and, in a later paragraph, agreed to allow him to have a salary account of a certain sum per annum, payable in monthly instalments. Sums advanced on the salary account were to be deducted from commissions that might be due, but there was no provision that any part of the salary should be refunded if the commissions earned fell below that sum. *Held*, that the salesman was entitled to the salary, and the provision as to commissions was inoperative so long as they did not exceed the salary.
2. Under a contract by which an employee agrees to perform services to the satisfaction of his employers, they may discharge him if dissatisfied, and it is immaterial whether the reasons for dissatisfaction exist in fact or in imagination; but the dissatisfaction must be real and in good faith.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This action arose out of the following contract, in which the plaintiff is the party of the second part and the defendants are parties of the first part:

"This agreement, made and entered into this seventeenth day of August, A. D. 1905, by and between *Abraham Weil* and *Harry Pflaum,* copartners, doing business under the firm

name of Weil, Pflaum & Company, parties of the first part, and *Albert B. Lieberman,* party of the second part, witnesseth:

"(1) The parties of the first part hereby agree to employ the party of the second part as a traveling salesman from the first day of October, A. D. 1905, to the thirteenth day of September, A. D. 1907, and agree to pay to said party of the second part seven and one-half (7½) per cent. commission on cash collected on the sales made by party of the second part for and on behalf of the parties of the first part, it being the intention hereby to pay to the party of the second part a commission of seven and one-half (7½) per cent. on the net sales made by said party, the parties of the first part to deduct from all sales made by the party of the second part, before paying him any commissions, amounts lost by failures, cancellations, or returns of merchandise on all orders secured by the party of the second part.

"(2) Said parties of the first part further agree to advance to the party of the second part all necessary traveling expenses, not exceeding $650 for the spring trip and $850 for the fall trip.

"(3) Said parties of the first part further agree to allow said party of the second part to have a salary account of twenty-seven ($2,700) hundred dollars per annum, payable in monthly instalments of two hundred and twenty-five ($225) dollars each, such sums of money so advanced on account of said salary account and all moneys advanced by the parties of the first part to the party of the second part on account of necessary traveling expenses to be deducted from any commission that might be due from the parties of the first part to the party of the second part, under the terms and conditions of this agreement.

"(4) In consideration of the foregoing the party of the second part hereby accepts said employment and agrees to devote his entire time and attention and give his best efforts and services to the parties of the first part during the continuance of this agreement, and agrees to perform his services to the satisfaction of the parties of the first part, and further agrees not to enter into any other employment during the term of this agreement, or to devote any of his time and attention to any other business or to represent any other firm or corporation,

either upon salary or commission, during the term of this agreement.

"(5) It is further stipulated and agreed by and between the parties hereto that there will be an accounting one year after the commencement of the employment of the party of the second part under the terms of this agreement, and that at such accounting all moneys drawn by the party of the second part on account of his monthly advance account and on account of all necessary traveling expenses shall be deducted from any commissions which the party of the second part may have earned under the terms of this agreement, and the surplus, if any, shall then become due and payable to the party of the second part."

The plaintiff was discharged August 7, 1906. Thereafter he sought and procured other employment, and brings this action to recover the difference between the amount actually earned by him between August 1, 1906, and September 30, 1907, and the amount which he would have received from the defendants on the basis of a salary of $2,700 per year had his contract remained in force.

The court submitted the following question to the jury for answer: "Was the plaintiff discharged by the defendants because plaintiff's services were unsatisfactory to defendants in good faith?" The jury answered this question in the negative, and judgment was rendered on such verdict in favor of plaintiff for $1,200 damages, together with interest and costs, aggregating in all $1,442.03. From such judgment defendants appeal.

Frank M. Hoyt, for the appellants.

W. B. Rubin and *W. C. Zabel,* for the respondent.

The following opinion was filed January 11, 1910:

BARNES, J. The defendants contend that the provisions of the first paragraph of the contract are controlling as to the compensation which plaintiff should receive. If this view of the contract is correct, plaintiff failed to show that he was entitled to recover any damages whatever. Defendants fur-

ther contend that they had the right under the contract to discharge the plaintiff at any time his services were not performed to their satisfaction; that they had reason to be and were dissatisfied with the services rendered, and had the unequivocal right to discharge, which they exercised in a proper manner, and therefore no recovery should be permitted.

Considering the first paragraph of the contract alone, the plaintiff would be entitled to receive a commission on his sales for his compensation. The third paragraph, however, seems to plainly provide that the plaintiff should have a salary of $2,700 per year. There is no covenant that any part of this salary should be refunded in the event that the commission provided for in the first paragraph should be less than the salary account provided for in the third. Neither is there any provision for a refund in the final paragraph of the contract, which designated how and when settlements between the parties should be made. This fact, coupled with the positive agreement to pay $2,700 per annum in salary, leads us to the conclusion that, construing the instrument as a whole, the plaintiff was entitled to draw the salary provided in the agreement, and that the provisions of the first paragraph of the contract were inoperative so long as the commissions on sales did not exceed the salary provided for. Parol evidence of the negotiations between the parties which resulted in the written contract was offered and received without objection. If we concede the contract to be ambiguous and the parol evidence referred to competent, a consideration thereof and of the practical construction apparently placed upon the contract by the parties lead to the same conclusion.

It is conceded that by the terms of the contract the defendants might discharge the plaintiff if they were dissatisfied with him, and that it was immaterial whether the reasons for dissatisfaction existed in fact or in imagination. But the "dissatisfaction must not be capricious or mercenary, nor result from a dishonest design to be dissatisfied in any event.

It must be real and in good faith." *Parr v. Northern E. Mfg. Co.* 117 Wis. 278, 289, 93 N. W. 1099, 1103. Other cases to the same effect are *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356; *Exhaust V. Co. v. C., M. & St. P. R. Co.* 66 Wis. 218, 28 N. W. 343.

The jury found that the defendants did not in good faith discharge the plaintiff because his services were unsatisfactory. There is a very considerable quantum of evidence in the case to support this finding, notwithstanding the fact that the defendants on the trial gave entirely satisfactory reasons for the discharge. The jury evidently believed that the reasons given on the trial were not the ones that actuated the defendants in making the discharge. It would serve no useful purpose to recapitulate the testimony which we conclude is sufficient to support the verdict. These views render it unnecessary to discuss other questions argued by the appellants.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied February 22, 1910.

HAZELTON and another, Appellants, vs. NEW YORK LIFE INSURANCE COMPANY, Respondent.

SAME, Respondents, vs. SAME, Appellant.

December 10, 1909—February 22, 1910.

Life insurance: Dividend certificate: Uncertainty: Liability of company for interest, etc.: Transfer of chose in action by husband to wife: Pleading statute of limitations.

1. A dividend certificate, issued by a mutual life insurance company to the beneficiary named in a policy, stating that she is entitled to $12 "in the accumulations" of the company, "subject to the rights of the company under its charter, and redeemable at the discretion of the board of trustees," lacks certainty. *It would seem* from its language that the interest of the beneficiary was intended to be an undivided interest in the accumulation fund

in the ratio which $12 bore to the interest of the other policyholders in such fund; but upon the evidence in this action (brought upon such certificate many years after its issuance) it cannot be determined whether the company was chargeable, as trustee or otherwise, with interest or profits or, if so, the amount thereof.

2. The word "accumulations" in such certificate implies a rolling up, or the adding of interest or income to the principal, indicating that the certificate is not a mere scrip dividend, to be rebated on premium when called for and not to draw interest.
3. The issuance of a dividend certificate to a wife in 1867, by an insurance company in which the husband had insured his life for her benefit, did not transfer to her the title to the money represented by such certificate, since at that time a married woman could not acquire title to a chose in action from her husband by transfer from him.
4. The defense of the statute of limitations falls when the proper statute is not pleaded.

APPEALS from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed on plaintiffs' appeal.*

This action was brought to recover a sum of money alleged to be in the treasury of the defendant. The claim is based upon the following facts found by the court:

The plaintiff *G. W. Hazelton* took out a policy of insurance No. 16,680 in the defendant company on the 26th day of March, 1862, in the sum of $1,000 for the benefit of his wife, Martha L. Hazelton. The annual premium named in the policy was $26.70, which has been regularly paid, less the annual dividends due the assured as fixed and allowed by the said company, and said policy is still in force. In the year 1867 said defendant issued and delivered to Martha L. Hazelton the following certificate:

"No. 16,680. STATE OF NEW YORK.
Dividend of *The New York Life Insurance Company.* $12
1867. Nos. 112–114 Broadway.

"This is to certify that Martha L. Hazelton is entitled to Twelve dollars in the accumulations of the *New York Life Insurance Company,* subject to the rights of the company under

its charter, and redeemable at the discretion of the board of trustees, transferable only on the books of the company by her or her attorney, on surrender of this certificate.

"Witness the corporation seal of the company, New York, April 15, 1867.

[L. S.] MORRIS FRANKLIN, Prest.
[Rev. Stamp canceled.] WM. W. BEERS, Acty.
"Led. 6 Fol. 360."

Said Martha L. Hazelton died intestate, leaving no property or estate except said certificate. No executor or administrator has been appointed in the matter of the estate of said Martha L. Hazelton. The board of trustees of said company never, prior to the death of said Martha L. Hazelton, exercised its discretion to redeem said certificate, nor requested its surrender, nor took any action in relation thereto in any manner, nor did said company. After the death of the beneficiary named in said policy and said certificate, said company in answer to an inquiry notified said *G. W. Hazelton* that its books failed to disclose any such certificate outstanding, and on being furnished a copy thereof expressed its willingness to repay said sum of $12, but refused to account for or pay any interest thereon then or at any time thereafter. Said company is a purely mutual organization, managed by the trustees selected by the policy-holders, without capital stock, and without stockholders to share in the profits of its business. The revenues of the company are derived from premiums, interest on loans, and rentals of office buildings. It is customary to keep the funds of said company at interest, except such surplus as in the judgment of the trustees is required to meet the current demands and maintain the solvency of said company. No evidence was offered to the effect that when said certificate was issued there was any money in the treasury of said company belonging to *G. W. Hazelton* or to Martha L. Hazelton, and no evidence of any moneys belonging to *G. W. Hazelton* or Martha L. Hazelton ever having been invested by said company or earned any interest on account of

such investment. The assets of said company, as shown by its annual report for 1907, were $490,408,807.

The court concluded that the statute of limitations had not run at the date of the commencement of this action and could not be set in motion until the trustees had notified Martha L. Hazelton of its readiness to redeem said certificate; that the evidence fails to sustain the claim of the plaintiffs that a trust relation was created by the execution and delivery of said certificate which placed the company under legal obligation to account for interest on the sum of $12 mentioned in said certificate; that the claim of the plaintiffs that the retention of said dividend was intended and understood by the parties as a method for augmenting the insurance provided for in said policy when the same should become payable is not supported by the evidence; that no trust relation was created by the execution and delivery of said certificate; and that the plaintiffs are entitled to judgment against the defendant for $12 and interest thereon from the commencement of this action, with costs.

Judgment was entered accordingly, from which these appeals were taken.

For the plaintiffs the cause was submitted on the briefs of *G. W. Hazelton.*

For the defendant there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *J. L. O'Connor.*

KERWIN, J. It is to be regretted, on account of the small amount involved, that the case cannot be finally disposed of upon this appeal without further litigation and expense. But in view of the condition of the record we feel this cannot be done. We cannot find from the record that the questions involved have been tried and so presented as to enable this court to order the proper judgment without further evidence respecting the interest of the plaintiffs in the funds as evidenced by the certificate in question. Nor do we think the findings

and evidence warrant the judgment, although upon the evidence produced the interest of the plaintiffs, if any, is left uncertain. The certificate upon its face lacks certainty in the particular that it is not plain from it whether the beneficiary had a proportionate interest with other policy-holders in the fund to the extent of $12, or whether the $12 was segregated from the accumulation fund and held for the benefit of the beneficiary and kept accumulating. No explanation as to the proper construction of the certificate is made in the evidence, but the claim is that the plaintiffs are entitled to the $12 and interest upon it, either upon the theory of a trust or a repudiation of a trust. From the language of the certificate to the effect that the beneficiary is entitled to $12 in the accumulations of the defendant, subject to the rights of the company under its charter and redeemable at the discretion of the trustees, it would seem that the interest was intended to be an undivided interest in the accumulation fund in the ratio which $12 bore to the interest of other policy-holders in such fund. But what the rights of the company are do not appear from the record. Since the interest of the beneficiary is redeemable under the certificate only at the discretion of the board of trustees, no amount probably would be payable until such discretion was exercised. The defendant, however, having offered to pay $12, admitted interest in the accumulation, and it would seem to follow that the amount of a twelve-dollar interest would be recoverable, whatever that interest might prove to be by computation of profits accruing to the fund in the proportion of the beneficiary's interest therein. *Wharton v. Masterman,* [1895] A. C. 186, 197. The court found upon sufficient evidence that it is customary to keep the funds of the company at interest, except such surplus as in the judgment of the trustees is required to meet the current demands and maintain solvency, and that the assets of the company on December 31, 1907, were $490,408,807, and that the defendant is a purely mutual company without capital stock or

stockholders to share in the profits. So it would seem from the findings, in the absence of evidence to the contrary, that the accumulation fund must have increased during the time the beneficiary held the certificate. We therefore think the amount of plaintiffs' interest was not calculated upon a correct basis, as indeed it was difficult, if not impossible, to do upon the evidence presented, and therefore, in order that the amount due the plaintiffs be properly determined, a new trial must be had to the end that it may be ascertained whether the plaintiffs' interest accumulated, and, if so, the amount thereof.

It is contended by the defendant that the certificate is a scrip dividend merely, simply to be rebated on premium when called for, and not to draw interest. But, if so, why put in the form of an interest in the accumulations and make its payment conditional as specified in the certificate? It is difficult to find on the face of the certificate evidence of an intention to make it a scrip dividend. The word "accumulation" in the certificate gives character to it and implies a "rolling up" or the adding of the interest or income to the principal. 22 Am. & Eng. Ency. of Law (2d ed.) 727, and cases cited.

The plaintiffs further claim that the $12 was left with the company to procure additional insurance, and that the company, having repudiated this agreement, thereby became liable for interest on the fund. But the evidence as to this agreement seems to have been ruled out as incompetent on the ground that it was conversations had by plaintiff *G. W. Hazelton* with a deceased agent of the defendant. The principal difficulty with the case lies in the uncertainty of the character of the plaintiffs' interest in the certificate and whether the money or interest of the plaintiffs was so used as to charge the defendant with interest or profits, and the amount thereof. Evidence upon another trial should be directed to these points.

On the defendant's appeal it is contended that the action cannot be maintained by the plaintiffs, but should have been brought by the representatives of Martha Hazelton, deceased.

to whom the certificate was issued. This contention is unsound. The money belonging to the plaintiff *G. W. Hazelton,* the issuance of the certificate in the name of his wife did not transfer the title to the money to her, since at that time a married woman could not acquire title to a chose in action from her husband by transfer from him. *Carpenter v. Tatro,* 36 Wis. 297. The action was properly brought by the plaintiffs.

It is also insisted that the statute of limitation is a bar to the plaintiffs' claim. But the difficulty with this contention is that even if any statute of limitation would bar the claim, if pleaded, it must be the twenty-year statute, because the action is upon a sealed instrument, and that statute was not pleaded, so the defense of the statute of limitation must fall.

We therefore conclude that the defendant take nothing by its appeal, and that upon the plaintiffs' appeal the judgment must be reversed, with costs, and the cause remanded for a new trial.

By the Court.—It is so ordered.

TIMLIN, J., dissents.

ITZEL, Appellant, vs. WINN and others, imp., Respondents.

January 11—February 22, 1910.

Judgment: Res judicata: *Mandate construed: Conveyance of land by trustee: Incumbrances: Wrongful possession of land: Liability for taxes paid by owner.*

1. Disallowance by the county court of a claim against an estate for breach of the covenant against incumbrances in a warranty deed from the decedent to the claimant, on the ground that the deed was a purely voluntary conveyance, involved only the question of the legal liability of the estate on such covenant, and is not a bar to a subsequent action by the grantee to compel the executor and trustee of the decedent to remove the incumbrance in question pursuant to the terms of his trust.

2. In an action of interpleader brought by the executor and trustee of a decedent to determine the validity and effect of a warranty deed given by the decedent in her lifetime and the duty of the trustee, in whom the legal title was vested, as to transferring such title to the grantee named in said warranty deed free of incumbrances, a judgment sustaining the validity of the warranty deed as an effective exercise of the power of appointment reserved to the grantor in her prior conveyance to the trustee, and directing the trustee to "deed the property in dispute" to the grantee in said warranty deed, is decisive of a subsequent action between the same parties in which said grantee seeks to compel the executor and trustee to cancel and discharge a mortgage which was specifically in question in the former action.
3. When a person holding the legal title to land and also a mortgage thereon is commanded by a judgment to "deed" the land to a party who has by his pleading asserted his right to a deed clear of incumbrances, such judgment should be construed as requiring an effective deed conveying the premises free from the lien of such mortgage.
4. A wrongdoer who excludes the owner from the possession of land and deprives him of the rents and profits may be liable for such rents and profits but cannot be compelled to reimburse the owner for taxes paid during such wrongful occupancy.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This is an action in equity brought to compel cancellation and discharge of a mortgage upon a city lot owned by the plaintiff in the city of Milwaukee, and for further relief.

The facts are that prior to June, 1897, one Mathilda O. Abbey, now deceased, was the owner of the lot in question, and that during that month she conveyed it, together with her other real estate and personal property, altogether amounting to considerably more than $100,000, to the defendant *John E. Winn,* in trust to hold and manage, sell, collect rents and profits, apply so much of the receipts as he might think proper to the support of the grantor, and reinvest the proceeds of collections and sales as he might think best, making it his duty to provide for the suitable comfort and support of the grantor during her life, defray the costs and expenses of maintaining

the property, pay the lawful debts of the grantor theretofore contracted, and upon her decease, after payment of all her just debts and the expenses of the trust, to convey and assign the remainder of the property to such person or persons as the grantor might by instrument in writing, duly witnessed, acknowledged, and delivered in her lifetime, or by will appoint. It further appears that *Winn* accepted the trust and at once took possession of the trust property and entered on the discharge of his duties; that Mrs. Abbey was old and infirm; that the premises in question were subject to a mortgage of $5,000 executed by Mrs. Abbey March 18, 1897; that on September 2, 1898, Mrs. Abbey executed and delivered to the plaintiff a warranty deed of the premises; that she died two days later, leaving a will (which has been duly probated) wherein, after certain minor bequests, she gave and devised the residue of her estate, one fourth to her half-sister, the defendant *Annie Mathews,* and three fourths to her nephew, the defendant *Taylor,* both of Philadelphia; that the defendant *Winn* was duly appointed executor of the will of the deceased and is now such executor; that the defendants *Mathews* and *Taylor* denied the validity of said warranty deed to the plaintiff and demanded that said *Winn* convey the said property to them, whereupon the said *Winn* in the year 1899 brought an interpleader action in the circuit court for Milwaukee county against the plaintiff and *Mathews* and *Taylor,* setting up the facts and asking the court to determine the rights of the parties in said lot; that after trial the circuit court set aside the deed because obtained by fraud and undue influence; that upon appeal to this court that judgment was reversed May 2, 1905, and the deed declared valid, and judgment was ordered "directing the trustee to deed the property in dispute to the defendant *Itzel*" (*Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220); that on July 6, 1905, judgment was entered in the circuit court for Milwaukee county pursuant to the mandate of the supreme court, adjudging that said *Winn* "deed the prop-

erty in dispute herein, to wit [describing it], to the defendant *Anna H. Itzel;*" and that on January 8, 1906, the said *Winn* made a conveyance of the property in dispute and delivered the same to the plaintiff, *Itzel,* but the terms of the conveyance do not appear from the evidence.

It further appeared that in July, 1899, the plaintiff, *Itzel.* filed in the county court of Milwaukee county a contingent claim against the estate of Mrs. Abbey in which she claimed to be entitled under the covenants of warranty in her deed to have the $5,000 mortgage aforesaid satisfied out of the funds of the estate or else to be paid a sufficient sum to satisfy the same herself, and that objections to the claim were filed and a trial had and the same was disallowed April 12, 1906. It was also shown that the defendant *Winn* met the defendants *Mathews* and *Taylor* in February, 1900, and had an accounting with them of the funds in his hands as trustee and executor, and the balance of such funds was determined; that the question of the $5,000 note and mortgage was then raised (the same not having been presented by its holder as a claim against the estate and the time fixed for the presentation of claims having expired); that *Mathews* and *Taylor* insisted that it should not be paid out of the trust funds, and *Winn* insisted that he must be protected against the possible allowance of it as a contingent claim in favor of *Miss Itzel;* that it was finally agreed that *Winn* should purchase it of the holder, taking the money out of the funds belonging to *Mathews* and *Taylor* and taking an assignment in blank; that he should fill his own name in the assignment and discharge the mortgage if the contingent claim was allowed, but should fill in the names of *Mathews* and *Taylor* and deliver all the papers to them if the claim was disallowed, and that this arrangement was carried out, the assignment in blank being taken by *Winn* February 6, 1900, and the note, mortgage, and assignment having been since held by him; that *Winn* had collected but $9.19 as rent upon the premises; that he paid the taxes for 1898 thereon out of the trust funds and the county taxes for

1899 but no more; and that the plaintiff, *Itzel,* redeemed the taxes accruing thereafter up to and including the taxes of 1906, and paid therefor with interest and fees an aggregate of $1,231.

The court concluded that the mortgage still remained a valid lien on the property, and entered judgment dismissing the complaint and adjudging the mortgage to be a valid lien, and the plaintiff appeals.

F. C. Eschweiler, for the appellant.

For the respondents there was a brief by *Frank M. Hoyt* and *Guy D. Goff,* and oral argument by *Mr. Hoyt.*

WINSLOW, C. J. The respondents contend that the plaintiff's claim is barred both by the judgment of the county court disallowing plaintiff's contingent claim against the estate of Mrs. Abbey and by the judgment of the circuit court in the former action of *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220, rendered pursuant to the direction of this court. As to the judgment of disallowance of the contingent claim, it seems clear that it cannot be held as *res adjudicata* in this case. It clearly appears that the claim filed in the county court was simply a claim to recover against the estate for breach of the covenant of warranty against incumbrances contained in the deed from Mrs. Abbey to the plaintiff, and that it was rejected simply because the county court held that deed to be a voluntary conveyance, based upon no valuable consideration but only upon love and affection, and hence upon familiar principles there could be no recovery upon the covenant of warranty. That controversy only involved the question of the legal liability of the estate upon the covenant of warranty. Neither the question as to the duty of the trustee, *Winn,* to discharge the mortgage, nor the question of the validity of the mortgage after its purchase by *Winn* with moneys of the trust estate, was actually or necessarily involved, considered, or decided in that case.

The action of *Winn v. Itzel,* however, did involve in sub-

stance the question involved in this case. Though the action was an action of interpleader and the present is essentially an action to remove a cloud upon title, both were between the same parties and both really involved the same general question, namely, the question as to the effect of the warranty deed before mentioned, and whether it became the duty of the trustee, by reason of the execution and delivery of that deed, to transfer to *Miss Itzel* the legal title of the premises in dispute free of incumbrances. It is true that the former action contained a larger question, namely, the question whether that deed was obtained by fraud, and, if that question were to be decided in the affirmative, then the other questions dropped out of the case; but, on the other hand, if that question were to be decided in the negative, then it became necessary at once to decide the other questions as to the duty of the trustee. This appears certain because the trustee made all the claimants parties and laid the whole controversy before the court and prayed for direction as to his duty; the defendants *Taylor* and *Mathews* came in and denied the validity of the warranty deed and prayed that *Miss Itzel* be required to quitclaim her apparent title to them; while *Miss Itzel* came in and alleged the validity of the deed and claimed that it was the duty of the trustee, by virtue of the trust deed, the warranty deed, and the directions of Mrs. Abbey, to execute to her a good and sufficient deed of the premises *free of all incumbrances,* the very incumbrance now in question being named and described in the pleading. So it seems not to be doubtful that the issue whether the mortgage in question should be paid by the trustee was fully presented and litigated between these same parties in the former action. True, the circuit court did not decide the question, because it held that the deed was void and hence there could be no duty on the part of the trustee under it; but when the case came here and this court held the deed to be valid, then the question of the trustee's duty under it became necessary to be decided. Examination of the briefs upon

that appeal show that counsel on both sides devoted their entire attention to the question of the validity of the deed and said nothing about the detail results in case the deed were held valid. It seemed to be taken for granted that if the deed were valid the results were not doubtful, and it is very evident that both counsel and court considered that the validity of the deed, if established, called for an affirmative judgment directing the trustee what to do with the legal title which had been placed in his hands in trust. The trustee had asked the court for direction as to his duty, the parties interested had asked for the same thing, and it was the duty of the court to respond.

It is to be regretted perhaps that this court did not respond more explicitly to this call. The mandate was that the judgment be reversed and the cause remanded with directions "to enter judgment directing the trustee to deed the property in dispute to the defendant *Itzel.*" It appears that judgment was entered in the circuit court in these words and that the trustee has made a deed (presumably a quitclaim deed) of the premises to *Miss Itzel,* but that the mortgage is still outstanding, having been purchased by the trustee in February, 1900, out of the trust funds in his hands under the arrangement with the respondents *Taylor* and *Mathews,* which is fully set forth in the foregoing statement of facts. The question now is as to the construction of that mandate. Does it mean that the trustee is to execute a bare quitclaim, or that he is to execute an effective deed of the lot? The mandate says he is to "deed the property in dispute." Now the property in dispute very clearly was the lot, free and clear of the mortgage. This court certainly was not expecting to frame a judgment which would leave undecided vital questions for future lawsuits and only partially respond to the issues made by the pleadings. That the court considered Mrs. Abbey's warranty deed as an effective exercise of the power of appointment which Mrs. Abbey reserved to herself under her deed

of trust cannot be doubted, because under no other theory would it be the duty of the trustee to make a deed. But if it was an effective appointment, then it was an appointment with a direction to make the deed free of incumbrances, because it contained a warranty against incumbrances.

We construe the mandate as a mandate to make an effective deed conveying the lot, and not a mere quitclaim conveying nothing but the equity of redemption after half or more of the property had been exhausted by incumbrances. This construction becomes more reasonable also from the fact that at the time the mandate was pronounced and ever since the trustee has been in possession of the mortgage by purchase with trust funds used for that purpose by the consent of the respondents. Thus it appears that the trustee was in position at that time and ever since to make an effective deed of the property. When a person holding the legal title of real estate and a mortgage on the same real estate is commanded by a judgment to "deed" the same to a party who has by his pleading asserted his right to a deed clear of incumbrances, it would seem that a fair construction of the word "deed" demands that he make an effective deed, not a deed which in effect reserves half the beneficial interest to himself. So we construe the judgment in the former action as requiring the trustee to make a deed clear of incumbrances, and hence decisive of the present action in the plaintiff's favor upon that question.

The plaintiff also seeks to recover the taxes which she has paid on the premises during the time between the execution of the Abbey deed in 1898 and the date of the execution of the deed by the trustee in 1905, on the ground that during this period she was kept out of possession by the defendants wrongfully and deprived of the rents and profits, and that the wrongdoers should be compelled to reimburse her for the taxes paid during such period. We know of no legal principle which would justify such a recovery. Property owners must pay the taxes on their own property. If a wrongdoer takes pos-

session of the property he is or may be liable for the rents and profits during his occupancy, but not for the taxes which the owner pays. The proof shows that as matter of fact a tenant was in possession during the whole time; that owing to a notice from the plaintiff the tenant paid no rent to the trustee except $9.19; and that the property was in so ruinous a condition that the trustee concluded it to be unwise to attempt to collect the rent by legal proceedings or to repair the property.

There should be a judgment against *Winn* for the $9.19 so collected as rent, in addition to judgment declaring the property to be free from the lien of the mortgage in question.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the plaintiff in accordance with the opinion.

BARNES, J., dissents.

CITY BANK OF PORTAGE, Respondent, vs. PLANK, imp., Appellant.

January 14—February 22, 1910.

Deeds: Validity: Grant to person not in existence: Ascertaining person intended: Bona fide *purchaser: Reliance on record: Unrecorded mortgage: Payment: Foreclosure of mortgage: Judgment for deficiency.*

1. In general, a grant to a person not in existence is void; but where the parties to the transaction knew that the grantee named was dead, the inference is that by the use of that name they meant to designate some existing person or persons, and the court will inquire into the situation, the general design of the parties, and the equities between them, to ascertain who was intended.
2. Thus, in this case, by the use of the name of a decedent as grantee in a conveyance of land it was intended to designate the executor of his will and to pass the title to such executor in his capacity as such, charged with such trust as might be found necessary to protect all parties interested in the estate of the decedent; and the deed is given effect accordingly.

3. One who occupies the attitude of a purchaser of a clear title to land from a mortgagor, relying in good faith upon the registry records, and receiving, together with a full warranty deed from the vendor, a discharge of the mortgage by the record owner thereof, and placing the instruments upon record, will be protected as against an assignee of the mortgage whose assignment had not been recorded. The fact that, at the time of receiving such deed and discharge, the purchaser paid over to the supposed owner of the mortgage the money which was to satisfy it, does not show that he was discharging an obligation from himself to the payee, so as to bring him within the rule that a debtor whose debt is evidenced by a negotiable note, though secured by a recorded mortgage, has no right to rely on the records in paying such debt to other than the real creditor, his authorized agent, or one in actual possession of the note.
4. In a statutory foreclosure action, if the principal cause of action fails there can be no judgment for deficiency.

APPEAL from a judgment of the circuit court for Waushara county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action to foreclose a certain mortgage on the south one-half of the southwest quarter of section 21 in town 20 north, of range 8 east, in the county of Waushara, Wisconsin, dated October 1, 1904, for $3,000, executed by the defendants William Eachor and Flossie Eachor to defendant M. Plank and by him assigned on November 15, 1904, to the plaintiff to secure his promissory note of $1,500 dated October 15, 1904, upon which there was due the principal and interest from April 3, 1908. The plaintiff also prayed a cancellation of a discharge of that mortgage, which had been made by M. Plank and recorded on or about September 3, 1907, after its assignment but before the record thereof, which was June 29, 1908. It appeared and was found by the court that one E. D. Plank, the father of both M. Plank and *Edward S. Plank,* had, prior to all these transactions, made a will, by which, after certain legacies, he devised and bequeathed to the appellant, *Edward S. Plank,* all of a considerable residue of his estate, charged with the care and support of the mother, including therein

specifically a certain 200-acre farm belonging to E. D. Plank. On January 23, 1905, he sold that farm to M. Plank and received as consideration therefor a certain $3,000 mortgage executed by the same defendants, the Eachors, to M. Plank on certain 120 acres of land contiguous to the eighty acres included in plaintiff's mortgage, the whole being used together as a farm. The father, E. D. Plank, died, and his will was admitted to probate in September, 1906, and *Edward S. Plank* was appointed executor. Early in 1907, the Eachors having failed to pay anything on their two mortgages, and having abandoned their farm of 200 acres, *Edward S. Plank,* who was a farmer and had sold his own farm, conceived the idea of purchasing the Eachor farm, a part of it in substitution for the $3,000 mortgage held by the estate and which belonged to him either as executor or residuary legatee charged with the support of the mother. He and M. Plank conferred about the matter and consulted counsel, and the plan was conceived of having that portion of the farm which was taken in consideration of the estate's mortgage conveyed directly into the same title as the mortgage had been held, to the end that it might stand specifically charged with the mother's rights. Accordingly *E. S. Plank* negotiated with Eachor for a conveyance of the entire 200 acres in consideration of the cancellation of the $3,000 mortgage which had been assigned to E. D. Plank and was part of his estate, and $1,800 in money which M. Plank agreed with Eachor to accept in satisfaction of the other mortgage to M. Plank, being that assigned to the bank and here sued on; but, the assignment being unrecorded, that fact was wholly unknown to either *Edward S. Plank* or to Eachor. An abstract was obtained and submitted to the attorney of *Edward S. Plank,* accompanied by a certificate of the register that no assignment of the mortgage sued on appeared of record. Conveyance or releases were obtained from certain other parties extinguishing rights in the land, and in May, 1907, two full warranty deeds were executed by Eachor

and his wife and deposited with M. Plank, one running to E. D. Plank, his heirs and assigns, of the eighty now in question and one of the other forties, the other to *Edward S. Plank* of the remaining eighty acres, and at about the same time, and before the delivery of the deeds to *E. S. Plank,* M. Plank executed a complete discharge of the mortgage to him, which had been assigned to the plaintiff. Thereupon the deeds were delivered to *Edward S. Plank,* who delivered his discharge of the estate mortgage and paid the $1,800 in addition, and thereafter entered into possession of the entire 200-acre farm. The deeds and releases were recorded September 3, 1907. Final order in the E. D. Plank estate, dated January 27, 1908, assigned the residue, including this land by specific description, to appellant subject to charge for his mother's support.

None of the defendants other than *Edward S. Plank* made any appearance or interposed any defense. The court held that deed, running to a person already dead, was absolutely void and of no effect, and left the title in Eachor, and accordingly entered judgment for the full sum of the Eachor mortgage in favor of the bank and for sale of the mortgaged premises and payment of the full proceeds to the extent of such $3,000 and interest to the bank. From such judgment the defendant *Edward S. Plank* appeals.

For the appellant there was a brief by *E. F. Kileen,* attorney, and *B. R. Goggins,* of counsel, and oral argument by *Mr. Goggins.*

For the respondent there was a brief by *Rogers & Rogers,* attorneys, and *H. E. Andrews,* of counsel, and oral argument by *J. H. Rogers.*

DODGE, J. 1. Appellant attacks the holding that the deed to E. D. Plank was ineffective to convey any title or interest in the mortgaged premises. It is a rule asserted from early times that no grant can exist without a grantee. This is of

course axiomatic. The title cannot pass from the grantor unless it passes to some one. As a corollary, it is declared in many cases that a deed or grant to a person who does not exist at the time of the grant is void. Such statements are unassailable if properly understood. If the grant, in the intention of the parties, is attempted to be made to some person who has no existence, it cannot take effect. *Neal v. Nelson,* 117 N. C. 393, 23 S. E. 428. Many technical rules, however, have yielded to more rational views in modern times. The real intention of the parties is to be sought and effectuated by courts when possible. If it was the intention both of grantor and grantee that the grant should be to some person or persons in existence, that intent may be effectuated by ascertaining under proper rules of evidence the intention of the parties, although such person be not designated by his legal or usual name. It has been said in many cases that a conveyance to a partnership name could have no validity because a partnership has no legal existence. But the overwhelming weight of modern authority is that courts may ascertain the fact that certain existent individuals are accustomed to be called by the association name, either corporate or copartnership, and draw the inference that those persons were intended to be the recipients of the title, although their true names did not appear in the firm name at all, and even if the names of other existent persons did so appear. Again, it is recognized in a multitude of cases that if the court can find that a certain person was intended as grantee, it matters not what name is given him in the deed. The case of *Staak v. Sigelkow,* 12 Wis. 234, is an illustration. The proposition is broadly stated in *Case v. Fish,* 63 Wis. 475, 479, 22 N. W. 322, and *Conroe v. Case,* 79 Wis. 338, 48 N. W. 480. When parties deliberately on one side make a conveyance and on the other side receive the same and pay a consideration therefor, there is a most irresistible inference that a conveyance is intended. Such intent of necessity involves the further conclusion that the parties had

in mind some person or persons to whom the property should pass. When a person well known is named, and that person has gone out of existence without the knowledge of the parties, it may well be that no inference is justifiable that any one else was intended. But when the person formerly bearing the name written in the deed is known to both parties to be dead, the inference is very strong that by the use of that name they mean to designate not the dead man but some existent person or persons. In such case the authorities mainly support the power of courts to inquire into the situation, the general design of the parties, the equities between them, and the like, in order to infer who was intended or who equitably ought to have been. It is analogous to the use of a name never, to the knowledge of either party, borne by any person, *i. e.* a fictitious name, as in *Staak v. Sigelkow, supra; Chapman v. Tyson,* 39 Wash. 523, 81 Pac. 1066; *Clifton Heights L. Co. v. Randell,* 82 Iowa, 89, 47 N. W. 905; *Wilson v. White,* 84 Cal. 239, 24 Pac. 114; *Thomas v. Wyatt,* 31 Mo. 188; *Simmons v. Spratt,* 26 Fla. 449, 460, 8 South. 123.

Applying those considerations to the situation here, it is hardly doubtful, all parties knowing of the death of E. D. Plank and that the residue of his estate, which would include this land if belonging to it, was to pass to *Edward S. Plank* subject to a certain charge in favor of the widow and also subject to the possibilities of other claimants against his then unsettled estate, and that all such interests were represented by *Edward S. Plank* in his capacity as executor, with the desire to protect on record all such rights, that the intention was to use the name of E. D. Plank to designate *E. S. Plank* in his capacity as executor. This view is supported also by the fact that the land was, in a sense at least, acquired in enforcement of the mortgage belonging to the estate; also that his title as executor would be charged with such trust as might be found necessary to protect all parties interested in said estate, *i. e.* the land would become an asset

in the estate of E. D. Plank and protect the same interests as if owned by E. D. Plank. We are convinced that such intention was very clearly established, and that the instrument was therefore effective to convey at least the full equitable title to the executor. Such title has been by the will of E. D. Plank and the final order of assignment fully transferred to *E. S. Plank* individually.

2. Having reached the conclusion that appellant is the owner of the mortgaged premises, we have next to consider whether his title is subject to, or free from, the lien of plaintiff's mortgage as an original question, since the trial court has declared no decision thereon. True, the court found that M. Plank acted with fraudulent intent in discharging the mortgage, but made no finding of any knowledge of, or participation in, such intent by appellant, and the evidence against such knowledge or participation is quite convincing. The question is, therefore, whether *E. S. Plank,* under the circumstances, was entitled to rely on the registry records showing a discharge by the record owner of the mortgage. That the purchaser of real estate will ordinarily be protected in so doing is fully established—by statute in case the conveyances on which he relies are of record before the conflicting ones (sec. 2241, Stats. 1898), and by deliberate decision of this court, even in absence of such prior record, on grounds of estoppel. *Friend v. Yahr,* 126 Wis. 291, 104 N. W. 997; *Marling v. Nommensen,* 127 Wis. 363, 106 N. W. 844; *Marling v. Jones,* 138 Wis. 82, 119 N. W. 931. To this general rule there is the apparent exception that a debtor whose debt is evidenced by a negotiable note, though secured by a recorded mortgage, has no right to rely on the records in paying such debt to other than the real creditor, his authorized agent, or one in actual possession of the note. *Bartel v. Brown,* 104 Wis. 493, 80 N. W. 801; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423; *Bautz v. Adams,* 131 Wis. 152, 111 N. W. 69. It is contended that appellant falls within this excep-

tion. It appears, however, that he bought the land from Eachor by a full warranty deed, so that he did not by the conveyance assume any relation of debtor for this note, nor indeed did he ever acquire title subject to the lien of the mortgage. The evidence and finding is that appellant, through an agent, negotiated with Eachor and agreed on purchase for $4,800 for the entire 200 acres, of which $3,000 was to be paid by cancellation of the mortgage and debt belonging to the estate, Eachor assenting if M. Plank would cancel the mortgage and debt in suit standing in his name of record for the $1,800 balance. This he agreed with Eachor to do. Accordingly Eachor, in May, 1907, executed and placed in M. Plank's hands a full warranty deed to E. D. Plank. Abstracts were obtained and submitted to an attorney employed by appellant, who discovered defects of title to cure which certain conveyances were obtained and placed in M. Plank's hands. The attorney demanded as supplementary to the abstract a certificate that the mortgage in suit had not been assigned of record, which was furnished about June 17th together with a certified copy of the record of that mortgage. Thereupon M. Plank executed his discharge of said mortgage of date June 29th. Completion of the details of perfecting abstract title was protracted into August, when, it being approved by his attorney, the appellant paid over to M. Plank the agreed consideration, viz., the $1,800 in money and release of the estate's mortgage, and received delivery of Eachor's warranty deeds and M. Plank's discharge of the mortgage. We are convinced that appellant's attitude was that of a purchaser of a clear title to the land from Eachor; that he dealt with the land and not as payor of the debt. The only circumstance to cast any different color on the transaction was the manual payment to the supposed owner of the mortgage of the money which was to satisfy it. An exactly similar circumstance, however, was held not significant in *Marling v. Jones, supra,* page 91 (119 N. W. 931). It is quite as con-

sistent with a method of protecting M. Plank in the receipt of that portion of the purchase price which Eacher had agreed he should receive as with the idea that *E. S. Plank* was discharging an obligation owed by himself to M. Plank. As such purchaser of real estate the appellant is entitled to protection of the title which the records assured him was at the disposal of his grantor, both because his conveyances were first recorded and because the respondent is estopped by its omission to exercise ordinary diligence to warn those likely to purchase the mortgaged land in reliance on the registry. As a result, judgment must be directed denying any relief by way of foreclosure against the land or its owner, the appellant.

None of the relief sought against the other defendants is possible in a statutory foreclosure action where the principal cause of action fails. Nor indeed is it useful to the plaintiff. Indeed, the present judgment against such defendants for a deficiency after a sale which can never take place, might be an embarrassment to plaintiff in seeking other remedies upon its debt. The order for deficiency judgment is so dependent on, and merely ancillary to, the foreclosure and sale that it would be absurd left standing alone. *Marling v. Maynard*, 129 Wis. 580, 109 N. W. 537.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

KREMER, Respondent, vs. ARIANS, Appellant.

February 1—February 22, 1910.

Justices' courts: Garnishment in aid of execution: Jurisdiction: Return of execution nulla bona: *Appeal: Sufficiency of notice: Title of action: Findings of fact: Exceptions.*

1. In a garnishment action in a justice's court in aid of execution, under sec. 3700, Stats. (1898), no loss of jurisdiction results from return of the execution *nulla bona*. The action does not depend upon a levy or seizure by virtue of the execution, but upon the absence of such levy; and the right of the justice to the custody of property delivered to him by the garnishee pursuant to sec. 3723*b* rests upon that statute, not upon the execution.
2. A sheriff's return on execution that up to the return day he had been unable to find any property, necessarily negatives the finding of any at any earlier time.
3. The notice of appeal from a justice's court is sufficient to confer jurisdiction if it contains any fair and intelligible description which will enable the justice from his records, and the respondent from his knowledge of the situation, to identify the judgment from which the appeal is intended, although there are technical inaccuracies and omissions in such description.
4. Where, in a garnishment action in justice's court, a claimant of property brought into court is made a party and the garnishee discharged pursuant to sec. 3723*b*, Stats. (1898), such claimant becomes the defendant, and the action is properly entitled in a notice of appeal as being by the plaintiff against such defendant.
5. A finding of fact by the circuit court to which no exception is taken is a verity on appeal.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Plaintiff, having obtained judgment in justice's court for some $105 and costs against one Edith Reynolds, issued execution thereon, and on the 18th day of November, 1908, made necessary affidavit and procured to be issued a garnishee summons in aid of the execution against one A. C. Hoppmann, returnable December 18th. Hoppmann, on the return day, delivered to the justice a note and mortgage for $400 upon

certain real estate, also two checks of $50 each, indorsed by said Hoppmann, with answer that he held them in trust for, and belonging to, said Edith Reynolds pursuant to an agreement for settlement of her property rights in a divorce action, but they were claimed to be owned by virtue of a transfer from Edith Reynolds by her mother, *Barbara Arians.* Both Edith and *Barbara* appeared upon the order of the court interpleading the latter, and answered asserting the latter's ownership of the note, mortgage, and the checks. Hoppmann was dismissed. It appeared that the property had been placed in Hoppmann's hands by mutual written agreement between Edith Reynolds and her husband as a method of effecting distribution of his property and to secure an agreement that a divorce judgment should be entered, giving her $100 and a mortgage substantially to the same effect for $400, and that in event of failure so to do this property should be turned over to her. The court found that the judgment of divorce had been entered and that all the conditions and events existed to entitle Edith Reynolds to these documents at the time of the service of the garnishee summons. Evidence was given of an attempted purchase of the property rights under the divorce judgment by *Barbara Arians.* In justice's court this was held valid and *Mrs. Arians* entitled to the property. Plaintiff appealed to the circuit court, where the matter was heard upon the same evidence, and the court found that the transfer was ineffective to convey to *Mrs. Arians* either the note and mortgage or the checks and that the attempted transfer was not made in good faith, but for the purpose of hindering, delaying, and defrauding the creditors of Edith Reynolds, and particularly the plaintiff, and accordingly rendered judgment that at the expiration of ten days the clerk of the court pay to the plaintiff the $100 proceeds of the two checks, and that unless the defendant Reynolds should pay the balance due on plaintiff's judgment in the main action and the costs, the note and mortgage be sold by the sheriff as property is sold on

execution, and after deducting the fees and expenses of sale the sheriff pay to the plaintiff the amount due on his said judgment. From this judgment *Barbara Arians* appeals.

For the appellant there was a brief by *Ollis & Nelson,* and oral argument by *R. N. Nelson.*

J. Burritt Smith, for the respondent.

DODGE, J. 1. Jurisdiction of the justice is assailed because on the return day of the garnishee summons the execution was returned *nulla bona.* No statute or holding of this court is cited declaring any necessity for the execution to persist. The service of the garnishee summons is not a seizure of property upon the execution, for it is only authorized in case no property can be seized. Sec. 3700, Stats. (1898). It is the institution of an action against the garnishee, to proceed like other actions. Id. It depends, under our statutes, not on any levy or seizure by virtue of the execution, as in some states, but on the absence of such levy. Seizure being not an essential to the jurisdiction of the suit, persistency of the particular execution seems in no wise necessary to the continuation of the justice's jurisdiction to hear and decide the action. His custody of the disputed property even when turned over to him is not retained by authority of the execution, which runs, and gives authority, only to the constable or sheriff. The justice's right rests on the special statute authorizing him to receive and hold the property when surrendered by the garnishee in response to the summons and in exoneration of the latter's personal liability. Sec. 3723*b,* Stats. (1898). For these and other reasons we are satisfied that our statutory scheme does not contemplate the perpetuation of the execution by monthly renewals during the months or years through which the trial of questions of ownership of the disclosed property may be protracted, not only before the justice, but, on appeal, in other courts; and therefore that no loss of jurisdiction resulted from its return *nulla bona.*

2. The claim that the judgment is void because there is no showing that the sheriff could not find sufficient property to levy on is entirely met by the presence of the officer's return that up to the return day, December 18th, he had been unable by diligent search to find any such property. This necessarily negatives the finding of any at any earlier time.

3. Jurisdiction of the circuit court on appeal is assailed on the ground of defects in the notice of appeal. That notice, correctly addressed to the justice of the peace, entitled the action "*F. A. Kremer,* Plaintiff, *v. Barbara Arians,* Defendant," and stated that the plaintiff appealed "from the judgment rendered in said court before you in the above-entitled action on the 8th day of March, 1909, in favor of the defendant and against the plaintiff for the sum of $105 damages and ——— dollars costs." It is undoubtedly true that earlier decisions of this court tended to very strict and technical rules in appellate procedure. Recent decisions, however, have much modified the technicalities, and, recognizing that the law favors appeals from the lower courts, have tended to the more rational rule that any fair and intelligible description sufficient to enable the justice from his records, and the respondent from his knowledge of the situation, to identify the judgment from which the appeal is intended, will suffice to confer jurisdiction. The tendency of these later cases reached its culmination in *Cowles v. Neillsville,* 137 Wis. 384, 119 N. W. 91, wherein are collected most of the earlier ones, except *Hanrahan v. Janesville,* 137 Wis. 1, 118 N. W. 194. The statute (sec. 3754, Stats. 1898) requires merely presentation to the justice of a notice of appeal. The notice in question is criticised, first, because of the title to the action wherein the impleaded claimant of the property is named as defendant. The statute provides that upon the service of the garnishee summons shall be instituted an action in which the plaintiff in the original action shall be plaintiff and the garnishee, defendant. This action when originally commenced,

therefore, was correctly entitled *Kremer,* Plaintiff, *v. Hoppmann,* Defendant. When Hoppmann brought the property into court and impleaded *Barbara Arians* and she claimed the property, and by order of the court she was made a party and he discharged, he certainly was no longer defendant, and she as clearly became defendant within the theory of our garnishee proceedings. See sec. 2767, Stats. (1898), which declares that the claimant in case of interpleader shall become a defendant. Therefore the title used in the notice of appeal was technically correct; in any event, it permitted of no uncertainty as to the action intended to be described. In that action there was but one judgment, and that on the date correctly specified in the notice. That was a judgment, as stated in the notice, against the plaintiff and in favor of the defendant named. The notice, evidently by reason of the use of a printed form, then contained the words "for the sum of $105." Of course that was not a technically correct description of the judgment, for the defendant did not recover judgment for any sum, but she did defeat liability of herself and the claimed property for a judgment in a principal action wherein the amount claimed was $105. So that in a certain sense the judgment was in her favor to that amount. It is true, also, that the notice, while stating that the judgment was also for costs, did not state the amount of such costs, but left it blank. We are persuaded that under the liberal rule declared in the foregoing authorities neither the justice of the peace nor the defendant could have failed, by the exercise of ordinary intelligence and from an inspection of the record in this case, to ascertain what judgment was complained of by the plaintiff notwithstanding such ambiguous statements, which at best were mere surplusage. That being so, the notice was sufficient to confer jurisdiction upon the appellate court.

4. The judgment of the circuit court is assailed, first, because, as is asserted by appellant, there was no proof that

the right of Mrs. Reynolds to the property in Hoppmann's hands had become absolute at the time of the service of the garnishee summons. This contention, however, is met by an express finding by the circuit court that the facts had occurred to make such right absolute at that time, which finding is without exception. It therefore is a verity behind which we cannot look for evidence one way or the other. Sec. 3070. The only other attack upon the judgment is that the finding of the trial court that the transfer from Mrs. Reynolds to the appellant was made with intent to defraud her creditors, and especially plaintiff, is not in accord with the evidence. Upon this contention it suffices to say that we do find many facts and circumstances justifying some inference of fraudulent intent and participation therein by appellant, and, while there is testimony of interested parties tending to establish good faith, we do not discover any such clear preponderance against the finding of the trial court as to justify setting it aside.

By the Court.—Judgment affirmed.

JONES, Respondent, vs. SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS, Appellant.

February 1—February 22, 1910.

Life insurance: Breach of contract: Pleading: Rescission: Action for damages: Parties.

1. A complaint alleging that defendant life insurance company had notified an insured that it would not accept the assessment rate provided for in the insurance contract, but would demand a higher rate; alleging that the insured and the beneficiary had thereupon notified the company that they elected to consider such action of the company as an abandonment, repudiation, and breach of the contract and that they elected to rescind the contract and thereupon rescinded and abandoned it and that suit would be brought to recover damages for the breach; al-

leging damages because of such abandonment and repudiation of the contract by defendant; and demanding recovery of such damages—does not show a rescission of the contract, but states a cause of action for the recovery of its value as the damages occasioned by the breach.

2. The rights of the insured under a life insurance contract are valuable property rights, and invasion thereof by a breach of contract gives him a cause of action for damages.

3. Where the beneficiary in a life insurance contract is the assignee of all rights accruing to the insured from a breach of contract, she is the real party in interest and the only necessary party plaintiff in an action for damages for such breach.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

On August 2, 1893, Samuel T. Jones was admitted to membership in the defendant life insurance company and there was issued to him its endowment certificate and contract of insurance. The insured was forty-five years old, and the contract provided that he should pay $1.02 per month as the insurance assessment until he should be seventy years old, and that the company would pay to his widow upon his death an endowment benefit of $1,000. The complaint in this action alleges that the $1.02 was a fixed rate of assessment liability due and payable by a member in the ordinary class, in which Samuel T. Jones was and still continues to be, until he should be seventy years of age. The provisions of the contract regarding disability and old-age benefits and the payment of small amounts to be used in the administration of the local branch of the defendant company are irrelevant to the consideration of the case before this court, and the details concerning them will not be given. The plaintiff is the wife of the insured, the beneficiary named in the contract, and the assignee of the rights of the insured in the contract. Several times during the year 1908 and preceding the 1st of October the defendant notified the insured that after that date it would no longer receive the assessment rate of $1.02 per month, but that the monthly assessment rate thereafter would be $2.76.

On the last day of September, 1908, the insured, with the approval of the plaintiff, served a notice on the defendant that he was ready, able, and willing to pay all his rates and moneys of every nature and kind when due the defendant, but that he was not willing to pay any other or different or larger rate of assessment, and that he regarded the increase of the assessment rates as an abandonment and repudiation of his contract. On February 16, 1909, a notice signed by the plaintiff and the insured was served on the agent of the defendant. By this notice the plaintiff and the insured gave notice that they elected to consider that the raising of the assessment rate and the refusal to accept the old rate was an abandonment and a repudiation and breach of the endowment certificate and contract for membership and insurance and a refusal to carry out and perform the contract as agreed and promised; that they elected to rescind the endowment certificate and contract of membership and insurance; that they and each of them thereby rescinded and abandoned the endowment certificate and the contract of membership and insurance; and that suit would be brought by this plaintiff to recover her damages caused by the repudiation and abandonment of the contract by the defendant. Damages are alleged and demanded in this action because of the alleged action of abandonment and repudiation of the contract by the defendant in the sum of $603.49. This is an appeal from the order of the court overruling a general demurrer of the defendant to the complaint.

For the appellant the cause was submitted on the briefs of *Kreutzer, Bird, Rosenberry & Okoneski.* They contended that the complaint shows complete rescission of the contract between the parties, as a result of which neither party has any cause of action *upon the contract,* citing, among other cases, *Smeesters v. Schroeder,* 123 Wis. 116; *Merrick v. Northwestern Nat. L. Ins. Co.* 124 Wis. 221, 226; *School Dist. v. Hayne,* 46 Wis. 511, 515; *Urwan v. Northwestern Nat. L. Ins. Co.* 125 Wis. 349, 357, 361; *Charley v. Potthoff,* 118

Wis. 258, 263; *Graves v. White,* 87 N. Y. 463; *McKenna v. McKenna,* 118 Ill. App. 240; *Ralya v. E. C. Atkins & Co.* 157 Ind. 331, 61 N. E. 726; *Herpolsheimer v. Christopher,* 76 Neb. 352, 107 N. W. 382; *U. S. v. Behan,* 110 U. S. 338, 345.

Frank E. Parkinson, for the respondent.

SIEBECKER, J. The trial court overruled the demurrer to the complaint upon the grounds that the plaintiff and her assignor, Samuel T. Jones, the insured under the endowment certificate, treated the insurance contract as breached by the defendant, that they had elected to consider the contract as ended, and that their acts in effect amounted to an election to stand on the breach and to enforce their claim for a recovery of the value of the contract as damages for the breach of the agreement by the defendant. The appellant insists that the allegations of the complaint show that there was a rescission of the contract by the plaintiff and the insured following its alleged breach. An inspection of the complaint indicates that the pleader employed language whereby he omitted to preserve the distinction between a complaint for damages arising from a breach of the policy, which is the value of the contract, and one for the damages based upon a rescission of the policy. The nature of the complaint must be ascertained from a consideration of all the facts alleged, since the aspect of the whole complaint controls its nature rather than any of the allegations, which may be somewhat vaguely and loosely stated and permit of different interpretations leading to inconsistent results. The allegations of the defendant's repudiation and abandonment and of plaintiff's notice to the defendant electing to treat the contract as ended, and that plaintiff would claim damages for the breach, are controlling features of the transaction alleged, and the other matters pleaded must be interpreted in the light of these allegations and claims of the plaintiff. In this view of the pleading we are of the opinion

that the complaint must be held to allege a cause of action against the defendant for the recovery of the value of the contract as the damages occasioned by the breach. It has been held that the rights of parties to a contract such as is alleged to have existed between the parties herein are valuable property rights, and that an invasion of the rights of the insured by a breach of the contract gives rise to a legal claim for the damages resulting therefrom. *Merrick v. N. W. Nat. L. Ins. Co.* 124 Wis. 221, 102 N. W. 593; *Slocum v. N. W. Nat. L. Ins. Co.* 135 Wis. 288, 115 N. W. 796.

The plaintiff avers that she is the assignee of all the rights and claims that may have accrued to the insured as a result of the alleged breach. She is therefore the only party in interest under the complaint.

By the Court.—The order appealed from is affirmed.

FARRIS, Respondent, vs. BENTLEY and wife, Appellants.

February 1—February 22, 1910.

Waters: Navigable rivers: Title of riparian owners: Grants from government: Unsurveyed islands: Subsequent survey and patent: Location of island: Evidence: Ejectment: Description of land: Boundaries.

1. A grant from the United States of land bounded by a stream, with no reservation or restriction, will be given effect according to the law of the state in which the land lies.
2. A patent from the United States, without reservation, of land in this state on a navigable stream not forming the boundary line between states, vests title in the patentee to the center of the stream midway between the banks, regardless of the navigable channel, subject to the rights of the public in the stream; and he also takes title to any unsurveyed island included within such limits.
3. Such title of the patentee to an unsurveyed island cannot be divested by the United States by a subsequent survey and patent to another, in the absence of a showing that the island was left unsurveyed by fraud or mistake.

4. The map of the original government survey, showing the outline of an island near the south bank of a river, is not by itself sufficient to show that an island now located in the north half of the river was at that time in the south half.
5. The description of land in a complaint and judgment in ejectment as "Fraction Number Five in Section two, Township eight North, Range five east" (excepting a certain described parcel), "together with all the riparian rights appurtenant thereto, including all islands opposite the shore thereof and north of the thread of the river," is sufficient, since with the aid of a competent surveyor the lines can be run and the boundaries found.
6. That part of the bed of a stream to which a riparian owner has title lies between the bank and the thread of the stream, and between lines drawn from the points where his boundaries reach the bank to the thread of the stream, at right angles to the line of such thread.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Ejectment to recover possession of an island in the Wisconsin river. The plaintiff claims title by virtue of his ownership of the north bank, to wit, fractional lot 5, section 2, township 8 north, range 5 east, which he holds by virtue of mesne conveyances from the original patentee, one Danforth, whose patent was issued October 2, 1854. The defendant *Bentley* claims title by virtue of a patent from the United States issued June 29, 1908, upon a survey of the island made pursuant to government order in 1905. The Wisconsin river at this point runs nearly due west with a slight deflection to the south. The island at the time it was patented to the defendant *Bentley* and at the present time lies wholly to the north of the middle of the river, measuring from bank to bank. It is some eighteen acres in extent, and the greater part of it lies directly opposite lot 5 aforesaid. The south bank of the river opposite the island was surveyed in 1833 and 1834, and Moses M. Strong entered lots 1, 2, 3, and 4 in March, 1837, and received a patent therefor in 1841, which lots are opposite the island in controversy. The north bank was surveyed in 1842, and lot 5 was patented to one Dan-

forth, plaintiff's remote grantor, in 1854. The island in question was never surveyed until 1905. No witness testified to the position of the island at the time of either of the government surveys of the banks, but an island appeared upon each plat. On the plat of the south bank, made in 1833 and 1834, an island was outlined opposite lots 1, 2, 3, and 4 aforesaid, and was represented as being all or nearly all in the south half of the river, measuring between the banks, while in the plat of the north bank made in 1842 an island was represented opposite lot 5 aforesaid, wholly in the north half of the river. One or two witnesses who knew the island and the river since about 1850 testified that in their judgment the islands so marked on the two plats represented the same island, namely, the island in dispute. No witness was sworn who had any personal knowledge of the location of the island or the banks of the river prior to 1850, and the defendants' own evidence showed that since 1850 the island had been mostly in the north half of the river. The testimony was undisputed that the navigable channel of the river from 1850 to about 1870 was north of the island, but that since the last-named date it had been south of the island. There was considerable testimony showing that there had been a gradual change in the outlines of the island by gradual erosion and accretion, by reason of which it was now further from the south shore than in 1850; but there was no evidence of any change in the banks of the river since 1850 exceeding a few feet, and no evidence of any change at all prior to that date.

By special verdict the jury found (1) that not all of the island was north of a line midway between the banks of the river in October, 1854, but (2) that all of the island is now north of such line. Judgment being rendered for the plaintiff on the verdict, the defendants appeal.

For the appellants there was a brief by *Bentley & Kelley,* and oral argument by *F. R. Bentley.*

Thos. W. King, for the respondent.

WINSLOW, C. J. It is settled in this state that where the state or nation makes a patent, without reservation, of lands on a navigable stream, the patentee takes title by favor or concession of the state to the center of the stream midway between banks, regardless of the navigable channel, subject to the rights of the public in the stream; and that he also takes title to any unsurveyed island included within such limits. *Chandos v. Mack,* 77 Wis. 573, 46 N. W. 803; *Sliter v. Carpenter,* 123 Wis. 578, 102 N. W. 27. The rule is necessarily modified in the case of a river which forms the boundary line between states, because the boundary line in such cases is the center of the main or navigable channel. *Franzini v. Layland,* 120 Wis. 72, 97 N. W. 499. It is equally well settled that where the United States grants lands bounded by streams and makes no reservation or restriction, the grant will be given effect according to the law of the state in which the land lies (*Hardin v. Jordan,* 140 U. S. 371, 11 Sup. Ct. 808, 838); and where according to such local law the title extends to the middle of the stream and includes an unsurveyed island, the United States cannot divest such title by subsequent survey and patent to another, in the absence of a showing that the island was left unsurveyed by fraud or mistake. *Grand Rapids & I. R. Co. v. Butler,* 159 U. S. 87, 15 Sup. Ct. 991; *Whitaker v. McBride,* 197 U. S. 510, 25 Sup. Ct. 530.

It necessarily follows that the survey of the island in 1905 and the patenting of the same to the defendants can have no effect on the plaintiff's rights if his remote grantor acquired title to the island by the patent of lot 5 on the north bank of the river in 1854.

The evidence is without dispute that the greater part of the island was north of the center line of the river at that time, though the jury found that it was not entirely north of that line; so there can be no question but that the patent carried the greater part of the island, unless it had passed with

the south bank to Moses M. Strong when he purchased that bank in 1837 or when it was patented to him in 1841. But there is an entire absence of evidence from which it could be found that the island was in the south half of the river at either of these dates. True, there appears on the map of the survey of 1833–34 the outline of an island near the south bank of the river opposite the land afterwards patented to Strong, but whether this outline was intended to represent the island in question, as some of the witnesses thought it did, is nothing but the purest conjecture. Neither court nor jury would be justified in finding that the island was in the south half of the river in 1833 from the mere outline on the map of something not within the limits of the property surveyed and which may have been intended to represent the island in question or may have been intended to represent one of the many evanescent, shifting sandbars which the evidence shows frequently form in the river. It follows that upon the evidence here presented it must be held that the title to all that part of the island north of the center line of the river and opposite lot 5 passed to the plaintiff's remote grantor by the government patent in 1854, and that such title was not divested by the survey and patent of the island in 1905.

It is objected that the evidence does not certainly show that the island is opposite to the plaintiff's land, and that the description of the property in the complaint and judgment is indefinite and uncertain. Neither of these points is well taken. A number of witnesses testified that the island was directly opposite the plaintiff's premises; in fact there seemed to be no dispute about it. The description of the land in the complaint and judgment is "Fraction Number Five in Section two, Township eight North, Range five east" (excepting a certain described parcel), "together with all the riparian rights appurtenant thereto, including all islands opposite the shore thereof and north of the thread of the river." This is a sufficient description, because, with the aid of a competent

surveyor, the lines can be run and the boundaries found. *Ayers v. Reidel,* 84 Wis. 276, 54 N. W. 588. It is to be remembered, of course, that when the boundaries of plaintiff's land reach the river they are to be produced to the center line between banks (or thread of the stream, which means the same thing), not directly north and south, but at right angles with the line of the thread of the stream.

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6. Where by an arbitration agreement the amount due plaintiff is to be determined by plaintiff's auditor after inspecting and auditing defendant's books, the plaintiff by sending its auditor to examine the books accepts the agreement and becomes bound to

do such acts as will give it full effect; and defendant cannot thereafter object that the agreement is unilateral and without consideration. *Travelers Ins. Co. v. Pierce E. Co.* 103

7. Where a party to an arbitration agreement was given full opportunity to be present before the arbitrator at all material times and availed himself of such opportunity, he cannot thereafter complain that the agreement failed to provide for notice of hearings and that no notice was in fact given to him or to the other party. *Ibid.*

ARRAIGNMENT. See CRIMINAL LAW, 4.

ASSIGNMENTS. See BANKS AND BANKING, 13, 14. LOGS AND TIMBER, 1. MECHANICS' LIENS, 4. MINES AND MINERALS, 1, 5. PARTIES, 2.

ASSIGNMENTS OF ERROR. See MASTER AND SERVANT, 25.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 4, 5, 15, 25, 26. RAILROADS, 6.

ATTACHMENT.

Lien: Waiver. See MORTGAGES, 2.

When an attaching creditor takes judgment upon an amended complaint including claims other than those secured by his attachment, he will be deemed to have waived his attachment and to have elected to accept merely the lien and rights resulting from the judgment, even where by reference to the pleadings it can be known definitely what amount of indebtedness secured by the attachment is included in the judgment. *Beyer v. Dobeas,* 89

ATTORNEY AND CLIENT.

Retainer and authority: Stipulations.

1. The general retainer of an attorney in charge of litigation is sufficient to enable him in his honest judgment to control all matters of procedure in the action. *Illinois S. Co. v. Warras,* 119

2. A stipulation in ejectment that defendant might amend his answer, without costs, after his strict right to do so had expired, and that each party might at the trial prove any title acquired after the commencement of the action, without a discontinuance and without payment of costs, amounted to a mere waiver of the procedure required by sec. 3074, R. S. 1878, and a balancing of the claims for costs (which in this case were nearly equal in amount), and was within the power of the attorneys and binding upon the parties, irrespective of express consent or knowledge of the parties. *Ibid.*

3. A stipulation cannot be attacked by defendant as lacking mutuality because signed for plaintiff by attorneys other than, and who had not been substituted for, the attorney who signed the summons, where it appears that the attorneys signing had, with consent of the original attorney and with knowledge of defendant's attorney, full authority from plaintiff to conduct the litigation, and had acted as his attorneys; also that the stipulation had been treated as effective by both parties and had been acted upon by defendant to his own advantage. *Ibid.*

4. The discretion of the trial court to relieve parties from stipulations when improvident and induced by fraud, misunderstand-

ing, or mistake, or when rendered inequitable by the development of a new situation, is a judicial discretion, to be exercised in the promotion of justice and equity. A stipulation relating to matters of procedure and having the essential characteristics of a mutual contract by which each party granted to the other a concession of some rights as a consideration for those secured, and which has been acted upon by the parties so that the *status quo* cannot be re-established as to one of them, should be set aside only in a plain case of fraud, mistake, or oppression. *Ibid.*

5. It was not an exercise of judicial discretion to set aside a stipulation in ejectment under the facts, stated in the opinion. *Ibid.*

AUDITORS. See STATES.

AUTOMOBILES.

1. An occupant of a private automobile cannot recover for an injury caused by a defect in the highway if the negligence of the driver contributed to the accident. *Lauson v. Fond du Lac,* 57

2. The driver of an automobile who, while traveling on a dark, rainy night over a straight stretch of strange country road, drives his machine at such a rate of speed that he cannot bring it to a standstill within the distance that he can plainly see objects or obstructions ahead of him, is not exercising ordinary care. *Ibid.*

3. Independent of any statute, it is negligence to run an automobile on a highway at night without sufficient lights to enable the driver to see objects ahead of him in time to avoid them. *Ibid.*

4. The lights which, under sec. 1636—52, Stats. (Supp. 1906), are to be displayed on an automobile driven on a highway at night are not required solely for the protection of travelers other than those in the automobile. *Ibid.*

5. The rule that it is not negligence to drive horses over a highway on a dark night without lights should not be extended to automobiles. *Ibid.*

AWARD. See ARBITRATION AND AWARD.

BAIL. See CRIMINAL LAW, 2, 3.

BANKS AND BANKING.

Definitions.

1. A person or corporation engaged in the business carried on by banks of deposit or of discount or of circulation is doing a banking business, although but one of these functions be exercised. *MacLaren v. State,* 577

2. The proprietor of a store which, in a "deposit purchase department," receives deposits of money, issues passbooks evidencing such deposits, pays interest thereon, and gives to the depositor an option to withdraw the deposit on demand, with interest, either in money or in goods, is doing a banking business within sec. 2024—787, Stats. (Laws of 1909, ch. 285). *Ibid.*

3. It is not herein decided that the proprietor of a store may not receive money on deposit from its patrons, to enable the depositors to purchase goods from the store, where the money is used for that purpose. *Ibid.*

Regulation.

4. Banking is a common-law right pertaining equally to every member of the community, and cannot be prohibited under a constitution like that of Wisconsin, which recognizes the right and authorizes the legislature to regulate and supervise it. *Weed v. Bergh,* 569

5. Under the constitution of Wisconsin banking may be regulated so far as may be reasonably necessary to secure the public welfare and safety, but it must be true regulation, not prohibition under the guise of regulation. *Ibid.*

6. Sec. 2024—78*m*, Stats. (Laws of 1909, ch. 285), making it unlawful for any person, copartnership, association, or corporation to do a banking business without being incorporated as a bank is not a prohibition, but is a valid regulation, of banking. *Ibid.*

7. Ch. 285, Laws of 1909, giving to existing private banks but three months after its publication to become corporate banks, is not shown, with respect to the plaintiffs in this case, to necessitate any sacrifice or loss of property such as might render the act void under constitutional guaranties. *Ibid.*

8. Independent of authority specifically granted in the constitution, the legislature may regulate banking, and might regulate the business of receiving deposits of money as stated in the opinion, even though that were held not to be banking. *MacLaren v. State,* 577

9. It was competent for the legislature to define as banking the business of receiving deposits as stated in the opinion, even if it were not so in fact, and to throw around such business the general safeguards provided for the banking business proper. *Ibid.*

Liability of cashier.

10. A by-law of a bank, made part of the cashier's contract of employment, providing that he should be "responsible for all moneys, funds, and valuables of the bank" renders him liable for shortages resulting from mistakes or malfeasance of his assistant, although the by-laws make such assistant personally liable for moneys coming into his possession. *Rio State Bank v. Amondson,* 82

11. Proof that according to the books of the bank, kept by the cashier and his subordinates, certain amounts had on different days been received by the bank which had never been accounted for in the cash was, in the absence of explanation, *prima facie* proof that moneys of the bank to that extent were missing. *Ibid.*

12. The liability of the cashier for such shortages in the cash is not affected by the fact that on other days there was more cash in the drawer than the books called for. *Ibid.*

Assignment of savings deposit book.

13. Evidence showing, among other things, that defendant had rendered services to plaintiff's intestate while she was sick and helpless, had advanced moneys to secure necessaries for her, had at her request attended to her affairs, and that he was in possession of her savings bank deposit book with a slip attached on which was written: "Ed, this is for you. Lida," and also of withdrawal receipts signed by her, is *held* to sustain a finding

by the court that said slip was an assignment of the bank book to him by the intestate. *Stacks v. Buten*, 235

14. A written assignment of a savings bank deposit book may convey title as between the assignor and assignee though not brought to the notice of the bank as required by sec. 2319c (Supp. 1906; Laws of 1901, ch. 390, sec. 1); and death of the assignor does not cancel such an assignment or prevent the assignee from thereafter making it effective as to the bank by delivering it or a copy to the bank. *Ibid.*

BILL OF SALE. See PARTNERSHIP, 1, 2. RECEIVERS.

BILLS AND NOTES.

Accommodation paper.

1. If an accommodation note, after being once negotiated, is paid at maturity by the primary debtor, it is thereby discharged and ceases to have any legal existence, at least as to the accommodation parties. *Marling v. Jones*, 138 Wis. 82, distinguished. *Comstock v. Buckley*, 228

2. If a broker employed to negotiate an accommodation note makes an honest sale thereof within his authority, he may afterwards purchase it back in his individual capacity and thereby acquire a good title which he may again transfer to another. *Ibid.*

3. But if the broker fraudulently sells the note and retains the proceeds in pursuance of a general purpose to embezzle such proceeds in fraud of the rights of his principal, he thereby, as between himself and his principal, becomes the primary debtor and cannot thereafter purchase the note so as to acquire the good title which the original transferee had by virtue of being a holder in due course. *Ibid.*

4. If, after such fraudulent sale, the broker pays to the transferee the amount due on the note and receives it back, it reassumes in his hands the position it formerly occupied, and he can again transfer it to another, not an innocent purchaser, only within the limits of his own rights and authority. *Ibid.*

Consideration.

5. An agreement to perform services is a sufficient consideration for a note. *Pierce v. Stolhand*, 286

Indorsement. See PRINCIPAL AND AGENT. SIGNATURES.

BOUNDARIES. See NAVIGABLE WATERS.

BREACH OF MARRIAGE PROMISE.

See DAMAGES, 7. INSTRUCTIONS TO JURY, 3.

1. The evidence in this case (consisting of the testimony of the parties) would not have warranted the jury in finding that the parties had sexual intercourse prior to any promise of marriage between them. *Hanson v. Johnson*, 550

2. In an action for breach of promise, where evidence that a child was born as a result of intercourse came into the case inadvertently, and afterwards letters which were otherwise competent referred to the child, an instruction to the jury to disregard this fact in assessing damages cured the error, if any, in the admission of such evidence. *Ibid.*

3. In an action for breach of promise, evidence as to the length of time the marriage engagement lasted and the number of years plaintiff waited for defendant to marry her, and as to the degree of intimacy between them, is competent upon the question of damages. *Ibid.*

4. Evidence as to the wealth of defendant, including testimony as to the amount of the monthly sales in his saloon, was competent in such a case. *Ibid.*

5. Admission in evidence, among the presents given by defendant to plaintiff, of a button bearing the photograph of a child which had been referred to as the result of intercourse between the parties, was an immaterial error, the photograph not being offered for the purpose of proving resemblance. *Ibid.*

BRIBERY. See HIGHWAYS, 1.

BRIEFS. See COSTS, 2.

BROKERS.

Duties to principal. See BILLS AND NOTES, 2–4.

Commissions.

1. By a contract reciting that plaintiff, a broker, had undertaken to procure a lessee or purchaser for certain land, defendant, the owner, agreed that if a certain lease should be executed plaintiff should receive a certain commission, and if thereafter during the term the lessee, its successors or assigns, should purchase the land, plaintiff should, "upon the execution and delivery by" defendant "of a deed to said real estate" to the lessee, its successors or assigns, receive a certain sum as a further and additional commission. The lease was executed, and gave to the lessee, its successors or assigns, an option to purchase. A successor to the rights of the lessee purchased pursuant to such option, and received a deed from a mesne grantee of the defendant who had purchased the land subject to the lease and option. *Held*, that plaintiff thereupon became entitled to the additional commission from defendant, it being immaterial whether the deed was executed directly by defendant to such purchaser or through mesne conveyances. *De Wolf v. Wisconsin Lakes I. & C. Co.* 239

2. Defendant could not escape liability for such additional commission by transferring the land to another, or by any failure on its part to execute and deliver the deed to the purchaser under the option given in the lease. *Ibid.*

3. To entitle a real-estate broker to recover his commission on a sale which his principal refused to carry out he need show only that he procured a purchaser who was ready, willing, and pecuniarily able, within the time fixed, to take and pay for the property. *McCabe v. Jones,* 540

4. "Pecuniarily able" in such connection means merely able to command the necessary money to close the deal on reasonable notice or within the time limited by the vendor. *Ibid.*

5. A proposed purchaser is pecuniarily able to complete the purchase if he has so arranged that the money will be forthcoming at the moment the deed is passed to him, although a part of

such money is to come from one who at the same moment receives a mortgage from such purchaser. *McCune v. Badger*, 126 Wis. 186, distinguished. *Ibid.*

BUILDING CONTRACTS. See CONTRACTS, 18. MECHANICS' LIENS.

BURDEN OF PROOF. See INSURANCE, 18. MUNICIPAL CORPORATIONS, 13. NEGLIGENCE, 7, 9. PARTNERSHIP, 2. RAILROADS, 26.

BY-LAWS. See BANKS AND BANKING, 10. RELIGIOUS SOCIETIES, 3.

CARRIERS.

Carriage of passengers: Personal injuries: Safe place to alight.

1. It is the duty of a common carrier of passengers to furnish a reasonably safe place for passengers to alight from trains; and for injury to a passenger exercising due care, caused by negligent failure to perform such duty, the carrier is liable. *Skowo v. Green Bay & W. R. Co.* 21
2. Evidence, stated in the opinion, is *held* to sustain findings by the jury to the effect that the place provided for passengers to alight was not reasonably safe. *Ibid.*
3. A finding that plaintiff was not guilty of contributory negligence is also *held* to be sustained by the evidence. *Ibid.*

CASHIERS. See BANKS AND BANKING, 10–12.

CHATTEL MORTGAGES.

Delivery: Escrow.

1. Mere manual tradition of an instrument to one as a custodian thereof for both the maker and obligee, under a mutual agreement not to give present validity to the paper, is not a delivery. *Carpenter v. Carpenter*, 544
2. A note and chattel mortgage from a son to his mother were deposited in a bank in escrow, together with a writing expressing the condition that they should not take effect or be enforceable unless the mother should survive the son. Afterwards the son was divorced, his wife being awarded the mortgaged property subject to the mortgage, but without any purpose of altering the agreement under which the securities were deposited. At the request of both the son and the mother, but without consent of the former wife, the papers were delivered by the bank to the son and by him placed on file. *Held*, that the mortgage did not thereby become effective as against the former wife. *Ibid.*

CHILD LABOR.

See INDICTMENT AND INFORMATION, 1.

1. The engagement of children in the kinds of work specified was the evil sought to be guarded against by subd. 2, sec. 1728*a*, Stats. (Laws of 1907, ch. 523), and the fact that the engagement was under a contract void because for labor to be performed on Sunday, does not preclude a prosecution of the employer. *State v. Hall*, 30
2. Defendant, the manager of a beer garden, contracted with an adult to furnish music therein for a gross sum. He neither knew nor saw at the time any of the musicians except the per-

son with whom he contracted, and had no knowledge as to their ages. That person employed a minor under sixteen years of age to assist with others in furnishing the music; but after defendant's attention was called to that fact he caused the minor to be discharged. *Held*, that the person contracted with was not, within the meaning of sec. 1728*h*, Stats. (Laws of 1907, ch. 523), defendant's agent, servant, or foreman in employing the minor, and that the violation, if any, of subd. 2, sec. 1728*a*, was not by defendant. *Ibid.*

CIRCUIT COURTS. See COURTS, 2. CRIMINAL LAW, 1. EXECUTORS AND ADMINISTRATORS, 2.

CLAIMS. See EXECUTORS AND ADMINISTRATORS. JUDGMENT, 8.

COGNOVIT. See JUDGMENT, 1, 2.

COMMERCE. See CONSTITUTIONAL LAW, 20.

COMMERCIAL PAPER. See BILLS AND NOTES. PRINCIPAL AND AGENT. SIGNATURES, 1, 4.

COMMISSIONS. See BROKERS. MASTER AND SERVANT, 2.

COMMON CARRIERS. See CARRIERS. RAILROADS, 2–26. STREET RAILWAYS.

COMPARATIVE NEGLIGENCE. See RAILROADS, 3, 4, 19–26.

COMPENSATION. See MASTER AND SERVANT, 2.

COMPETENCY. See EVIDENCE, 2. MASTER AND SERVANT, 6, 12. RAILROADS, 15.

COMPLAINT. See CONSTITUTIONAL LAW, 19. INSURANCE, 10. QUO WARRANTO.

CONDEMNATION. See EMINENT DOMAIN.

CONSIDERATION. See BILLS AND NOTES, 5.

CONSTITUTIONAL LAW.

Construction of constitutional provisions.

1. When the meaning of a constitutional provision is doubtful, long-continued practical construction thereof by the branches of government affected by it is strongly persuasive and often controlling. *In re Appointment of Revisor*, 592

Distribution of governmental powers and functions.

2. Each of the three governmental departments, legislative, executive, and judicial, has exclusive functions which no other department can perform; but there are many governmental operations and duties which do not pertain exclusively to any one department and may be performed by inferior officers or agents in aid of the functions of either. *In re Appointment of Revisor*, 592

3. Appointment to office is not exclusively an executive function; and when in the execution of their proper duties it becomes necessary or proper for either the legislative or judicial department to have administrative acts performed by assistants, such assistants may properly be selected by the legislature or judiciary, as the case may be, provided the constitution does not otherwise direct. *Ibid.*

Same: Legislative powers and functions. See BANKS AND BANKING, 4–9. INSURANCE, 15. STATUTES.

4. Though the legislature may provide new remedies for past wrongs it cannot create new obligations therefor. *Quinn v. Chicago, M. & St. P. R. Co.* 497

5. A general law enacted for the purpose of regulating a business which the legislature has power to regulate is not invalid merely because some persons upon whom it operates may be compelled to reconstruct their methods or cease to do such business. *MacLaren v. State,* 577

6. An act of the legislature is to be sustained if possible by any reasonable construction of the constitution or of the act itself; and all mere doubts as to its validity are to be solved in favor of the act. *In re Appointment of Revisor,* 592

7. The fixing of salaries, even in advance, is not exclusively a legislative power, but may be delegated to a court as to officers or agents whom the court is legally authorized to appoint. *Ibid.*

Same: Judicial powers and functions.

8. A court or judge may legally be authorized to appoint an officer, even though he be a state officer, where he is to act in an administrative way as an aid, even though indirectly, to the court in the performance of its judicial functions. *In re Appointment of Revisor,* 592

9. The duties of the revisor of the statutes under ch. 546, Laws of 1909 (secs. 116, 117, Stats.), are administrative duties in aid of the execution of the purely judicial functions of the supreme court so that the selection of such revisor and his assistants may properly be committed to the judges. *Ibid.*

10. The principle that the courts are only to determine what the law has been and is, and not what it is to be in the future, controls a court in the performance of its strictly judicial duties as a decider of controversies, but is not applicable to administrative acts or functions which it is necessary for the court to perform through agents or employees in aid of its purely judicial duties. *Ibid.*

11. The duties imposed upon the justices of the supreme court by ch. 23, Stats. (1898), are ministerial or administrative duties which may properly be imposed upon the judiciary, because they are either helpful or necessary in the performance of the purely judicial functions of the court. In performing such duties the justices do not hold a nonjudicial office in violation of sec. 10, art. VII, Const. *Ibid.*

12. So, also, as to the duties imposed by ch. 546, Laws of 1909 (secs. 116, 117, Stats.); and the justices are not attempting to hold another office when, acting as such trustees under that statute, they appoint a revisor of the statutes, fix his salary, approve his selection of assistants, etc. *Ibid.*

[13. As to the validity of ch. 547, Laws of 1909, no opinion is intimated by the court.] *Ibid.*

14. SIEBECKER and KERWIN, JJ., dissent as to the validity of ch. 546, Laws of 1909, but accept the opinion of the majority as authoritative for the present purpose and act with other members of

the court in executing the provisions of the statute. TIMLIN, J., dissenting, declines to act under the law. *Ibid.*

Same: Executive powers and functions. See CONSTITUTIONAL LAW, 1, 2. STATES. STATUTES, 1.

Police power.

15. In enacting a police regulation the legislature may include within the purview of the statute acts innocent and not in themselves the subject of police regulation, where the inclusion of such acts is necessary, in the opinion of the legislature, to make the police regulation effective. *Pennell v. State,* 35

16. On the principle above stated it was competent for the legislature by sec. 1565c, Stats. (1898), to forbid the sale in no-license territory of any fermented malt liquor containing alcohol. *Ibid.*

17. Reasonable legislative regulations regarding the adaptability of things placed on sale for human consumption, such as the products of mineral oil, and the proper keeping and handling thereof; for the prevention of fraud, are as well within sovereign police authority, as such regulations for conservation of public safety. *Wadhams Oil Co. v. Tracy,* 150

18. A legislative enactment under the police power cannot be condemned as a taxing measure and out of harmony with the constitutional rule of uniformity in that regard, unless the fees exacted are so clearly excessive, that the legislature could not reasonably have had in contemplation an equivalent for the mere expense of executing the law. *Ibid.*

19. An allegation in a complaint, challenging the legitimacy of an ostensible police regulation on the ground that the fees provided for are so large as to show, clearly, that the object thereof was revenue, does not tender an issue of fact for confession or denial by the adverse party, when it can be clearly seen from the face of the pleading, in the light of common knowledge and established judicial rules, that the fees are within reason as mere expenses of executing the law. *Ibid.*

20. A valid police regulation is not subject to successful attack under the commerce clause of the national constitution. *Ibid.*

Obligation of contracts. See CONTRACTS, 4.

Privileges and immunities: Freedom of worship: Liberty of conscience. See RELIGIOUS SOCIETIES, 4.

Equal protection of laws. See BANKS AND BANKING, 4–9. CONSTITUTIONAL LAW, 18. RELIGIOUS SOCIETIES, 4.

Due process of law. See PROCESS, 3.

Enforcement of constitutional provisions. See PATENTS.

CONSTRUCTIVE NOTICE. See MORTGAGES, 1. MUNICIPAL CORPORATIONS, 10, 11.

CONTINUANCE.

Denial of a motion for a continuance because of the absence of a material witness, and subsequent refusal to set aside the judgment and grant a new trial, are *held* to have been justified upon conflicting affidavits respecting the grounds alleged and the good faith of the moving party. *McFarland v. Zahl,* 511

CONTRACTS.

Entire contracts.

1. A contract for the sale of goods—in this case a quantity of gloves of different kinds at fixed prices—which is naturally severable will not be held entire, in the absence of express or implied provision to that effect therein, or persuasive circumstances showing intention of the parties to make it entire. *National K. Co. v. Bouton & G. Co.* 63

Requisites and validity. See FRAUDS, STATUTE OF, 1. HUSBAND AND WIFE. INSURANCE, 2–5. PATENTS, 1, 2.

Same: Proposal and acceptance: Consideration.

2. Where, before the enactment of ch. 499, Laws of 1907, a telephone company, in order to afford its patrons connection with the departments of the city government, offered to install and maintain telephones free of charge in such departments, and the common council accepted such offer, granting leave to the company to install its telephones in specified offices upon condition that the service should be first-class at all times and be continued so long as the company should operate a telephone system in the city, and the company accepted such conditions by installing the telephones as specified, a valid contract based upon sufficient consideration resulted. *Superior v. Douglas County Tel. Co.* 363

3. No written acceptance by the company of the privilege so granted was necessary to create a contract. *Ibid.*

4. Such a contract, if valid when made, is not affected by subsequent legislation prohibiting discriminatory rates, but is protected by the constitutional provision against impairing the obligation of contracts. *Ibid.*

Same: Mutuality. See CONTRACTS, 15.

Same: Consideration. See BILLS AND NOTES, 5.

Same: Legality of object and consideration.

5. At common law a public-service corporation may for special reasons make a different rate to one person than to another, or accept payment from one in money and from another in services or some reasonable equivalent,—only *unjust* discriminations being condemned. *Superior v. Douglas County Tel. Co.* 363

6. In a contract between a public-service corporation and a city, advantage given to the city over other patrons inures to the benefit of the public and does not, at common law, render the contract unenforceable. *Ibid.*

Construction: General rules. See HUSBAND AND WIFE, 3–6. INSURANCE, 1–9. MASTER AND SERVANT, 1, 2. MINES AND MINERALS. SALES. VENDOR AND PURCHASER.

Same: Definiteness: Reasonableness.

7. A contract by which a telephone company, in return for the privilege of placing telephones in the city departments, agreed to maintain such telephones free of charge so long as it continued to operate a telephone system in the city, was not so uncertain or indefinite as to its duration, or so unreasonable in that respect, as not to be enforceable according to its terms. *Superior v. Douglas County Tel. Co.* 363

Same: Ambiguity.

8. The word "audit," though sometimes restricted to a mere mathematical process, generally includes investigation, weighing of evidence, and deciding whether items should or should not be included. *Travelers Ins. Co. v. Pierce E. Co.* 103

9. Where the proper construction of an ambiguous contract depends in a measure upon somewhat confused facts and upon the inferences of intention to be drawn therefrom, the conclusion of the trial court as to such construction is entitled to the weight of the ordinary finding of fact. *Ibid.*

Same: Practical construction.

10. Practical construction placed by the parties in interest upon doubtful or ambiguous terms in a contract will exercise a great and sometimes a controlling influence in determining the construction to be placed thereon by the courts. *Burton v. Douglass,* 110

11. An agreement not to engage in the flour and feed business at a certain city "or vicinity" is *held* not to have precluded engaging in such business in villages about six and one-half miles from said city, both parties having practically so construed the contract—one by engaging in the business at such villages within a few months after the agreement was made, and the other by not objecting thereto until several years later, although prompt objection had been made when it was thought the agreement was about to be violated with respect to the city. *Ibid.*

12. Parol evidence to show that at the time of executing a contract the parties substantially agreed upon the definition of an ambiguous term therein does not alter or add to the written contract, but simply goes to show what they meant when they used that term. *Ibid.*

Same: Implied covenants.

13. A contract by which plaintiff made the defendant its agent for the sale of patterns and agreed to sell and deliver patterns to him at fifty per cent. of the retail price, and defendant agreed to keep on hand patterns to a certain amount at fifty per cent. of the retail price and not to sell them except at "label prices," indicates that the retail price is stamped on each pattern and is not uncertain as to the quantity which defendant is to purchase or as to the price he is to pay therefor. *Butterick P. Co. v. Rose,* 533

14. In such a contract there is an implied covenant on the part of plaintiff to furnish such patterns, to the amount named, as defendant may select out of plaintiff's stock. *Ibid.*

15. There being mutuality of obligation in a contract of agency for the sale of certain goods, a covenant therein by the agent not to sell like goods of other manufacturers may be enforced by injunction, even though specific performance of the covenants of the other party could not be enforced,—mutuality of remedy not being necessary in such case. *Ibid.*

Rescission. See INSURANCE, 10.

16. In an action for rescission of an executed contract induced by fraud and undue influence, where one of the defendants dies and his executors are substituted, the court should find what

part, if any, of the money or property wrongfully taken under the contract was received by the deceased wrongdoer, and judgment may be rendered against the executors for that amount only, with an express direction that it be collected only out of their testator's estate. *Borchert v. Borchert*, 142

17. The executors in such a case are necessary parties to the action so far as it seeks to rescind or annul a contract to which their testator was a party, but the judgment, if any, against them should be *de bonis testatoris*, not *de bonis propriis*. *Ibid.*

Performance or breach: When action may be brought. See INSURANCE, 10, 11. PARTIES, 2. PATENTS, 5, 6.

18. A subcontract for a building, among other things, required performance within a specified time and provided that if the subcontractor should neglect or refuse to complete his contract the principal contractor might take over the work and proceed to complete it. *Held*, that upon a breach by the subcontractor the principal contractor's right of action against him accrued at once, and the contract did not require the action to be postponed until after the completion of the work. *Hoganson v. Knutson*, 98

CONTRIBUTORY NEGLIGENCE. See AUTOMOBILES, 1–4. CARRIERS, 3. MASTER AND SERVANT, 10, 11, 22, 25. MUNICIPAL CORPORATIONS, 5, 7, 8, 11–14. NEGLIGENCE, 7, 8, 10. RAILROADS, 3, 4, 8, 9, 18, 20, 26. STREET RAILWAYS, 7. TELEGRAPHS AND TELEPHONES. TRIAL, 12.

CORPORATIONS.

Franchises. See APPEAL, 16.

By-laws. See BANKS AND BANKING, 10. RELIGIOUS SOCIETIES.

Capital stock: Purchase of its own stock.

1. As a general rule, in case a corporation purchases its own stock, paying therefor by corporate assets, subsequent creditors cannot be regarded, judicially, as prejudicially affected. *Atlanta & W. B. & C. Asso. v. Smith*, 377

2. As a general rule, unless plainly prohibited by statute or its organic act, a corporation may buy its own stock, using its assets therefor, so long as it acts in good faith pursuant to authorization by its governing body, and its officers, acting in like good faith, may do so as to stockholders actually or impliedly consenting and as to past or future creditors. *Ibid.*

3. The trust-fund doctrine that under all circumstances the assets of a corporation constitute a trust fund for creditors does not prevail in this state. *Ibid.*

4. If a stockholder of a corporation, by agreement with it or any of its officers, sells his stock to the organization in exchange for corporate assets, knowing, actually or constructively, that the result will be to render the corporation insolvent: all parties to the transaction contemplating that it will continue in business and incur indebtedness as before, the creditors relying upon appearance of the previous solvent condition continuing,—the result to them must be presumed to have been mutually intended, supplying the element of bad faith essential to condemn the transfer. *Ibid.*

5. In the circumstances stated in No. 4 the stockholder, co-opera in creating the delusive appearance, as to subsequent credit is estopped from claiming that his relations to the corpora were severed by the transaction so far as their continuanc necessary to preserve statutory liability under sec. 1773, St (1898). I

6. A transaction in the circumstances stated in No. 4 is void a subsequent creditors by the law of estoppel and by sec. 2 Stats. (1898), as well. I

7. Where a transaction involving a transfer of property is void to creditors of the transferor, and equity jurisdiction is not essary to remove a cloud on title or for some other relief wit the peculiar field of equity jurisdiction, the creditors may ceed at law, treating such transaction as if it never occur it being void as to him, and the bringing of an action incons ent with validity of the transfer being a sufficient election. I

8. TIMLIN, J., *concurring*, is of the opinion, further, that a corp tion which has not had fifty per cent. of its capital stock scribed has no power to dispose of its assets to a sharehol in purchase of his shares. I

Members and stockholders. See CORPORATIONS, 1-8.

Same: Special powers and privileges. See RELIGIOUS SOCIETIES.

Corporate powers: Title to property: Ultra vires.

9. The objection that a corporation, foreign or domestic, has power to hold title to property cannot be raised by a stran claiming the property, unless, perhaps, such lack of power suits from express statutory prohibition. If the acquiring such property is merely *ultra vires*, it can be questioned by persons directly interested in the corporation, or by the st *Illinois S. Co. v. Warras*,

Insolvency.

10. In an action under sec. 3216, Stats. (1898), for sequestratio the property of an insolvent corporation, based on judgm and execution returned unsatisfied, it is an irregularity to der a new judgment against the corporation; but other def ants are not prejudiced thereby. *McGovern v. Milwaukee M.*

11. In such an action a judgment might properly be rendered aga a fraudulent grantee of the property of the insolvent corp tion and against other defendants who assisted in perpetra the fraud, for the amount of the original judgment; but a j ment granting that relief and also appointing a receiver to sue the assets of the insolvent corporation can be sustained by construing the first part thereof as interlocutory and co tional upon the receiver being unable to collect from the as of the insolvent company, and only for the amount of the ficiency, if any, appearing from his report. I

12. Where an insolvent corporation, with intent to defraud a cred conveyed all of its assets to another corporation whose offi assisted in perpetrating the fraud, such grantee and its offi cannot avoid payment of the whole claim of the defrauded itor on the ground that, at the request of the grantor an

consideration for the fraudulent conveyance, they have paid to other creditors of such grantor an amount exceeding the value of the assets received. *Ibid.*

Service of process. See PROCESS.

Pleading corporate existence. See QUO WARRANTO.

Public-service corporations. See CONTRACTS, 2, 5. PARTIES, 1. RAILROADS, 1. STREET RAILWAYS.

Foreign corporations. See INSURANCE, 12–16. PROCESS, 1, 2.

COSTS.

Grounds and extent of right. See APPEAL, 8. SPECIFIC PERFORMANCE, 3.

On appeal.

1. Costs are not allowed for the printing of a case in violation of Supreme Court Rule 6. *Skow v. Green Bay & W. R. Co.* 21
2. Costs are disallowed for printing a case and brief in which Supreme Court Rules 9–12 were disregarded. *Peck v. Baraboo,* 48

COUNTERCLAIM. See MECHANICS' LIENS, 3. PLEADING, 1, 2.

COUNTY COURTS. See EXECUTORS AND ADMINISTRATORS.

COURT COMMISSIONERS. See COURTS, 2.

COURTS

Jurisdiction. See EQUITY, 1, 3. PATENTS, 4.

1. Courts of this state cannot acquire jurisdiction over persons not present in the state, except for the purpose of adjudicating with reference to property or status here located. *Fond du Lac C. & B. Co. v. Henningsen P. Co.* 70
2. The granting to other tribunals of jurisdiction over certain statutory offenses does not deprive the circuit courts of their constitutional jurisdiction over them, or court commissioners of their power to hold preliminary examinations in such cases, in the absence of unmistakable language in the statute showing such an intent. *Wieden v. State,* 585

Supreme court. See APPEAL. CONSTITUTIONAL LAW, 9, 11–14.

Circuit courts. See COURTS, 2. CRIMINAL LAW, 1. EXECUTORS AND ADMINISTRATORS, 2.

County courts. See EXECUTORS AND ADMINISTRATORS.

Court commissioners. See COURTS, 2.

COVENANTS. See CONTRACTS, 13–15.

CREDIBILITY. See INSTRUCTIONS TO JURY, 8–10. WITNESSES, 3.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See CHILD LABOR, 1. INDICTMENT AND INFORMATION.

Preliminary examination. See COURTS, 2.

1. Where the record transmitted to the circuit court by the examining magistrate showed that there had been a legal preliminary

examination, the summary overruling of a plea in abatement to the effect that there had been no such examination, without requiring issue to be joined on such plea, was not prejudicial, even though irregular. *Hack v. State,* 346

2. It is not essential that the examining magistrate should enter in his docket a finding that an offense had been committed and that there was probable cause to believe the defendant guilty thereof. It is sufficient if the record shows that defendant was held to bail and gave bail. *Ibid.*

Same: Bail.

3. An entry in the docket of the examining magistrate, that "the court bound the defendant over to the circuit court," sufficiently shows that the defendant was held to bail; and where it appears that a bail bond was given and approved it is immaterial that the amount thereof is not stated in the docket. *Hack v. State,* 346

Pleading. See INDICTMENT AND INFORMATION.

Arraignment and plea.

4. The right of arraignment and plea is waived by the defendant by his silence when he ought to demand it, in all cases (except capital cases) where he is fully informed as to the charge against him and is not otherwise prejudiced in the trial of the case by the omission of that formality. *Douglass v. State,* 3 Wis. 820, and other cases, overruled. *Hack v. State,* 346

CROSS-EXAMINATION. See WITNESSES, 1, 2

DAMAGES.

Nature and grounds. See INSTRUCTIONS TO JURY, 3, 4. MECHANICS' LIENS, 2, 3. NEGLIGENCE, 12. VENDOR AND PURCHASER, 2–6.

Nominal damages. See EVIDENCE, 4.

Measure of damages: Exclusion of owner from possession of land.

1. A wrongdoer who excludes the owner from the possession of land and deprives him of the rents and profits may be liable for such rents and profits but cannot be compelled to reimburse the owner for taxes paid during such wrongful occupancy. *Itzel v. Winn,* 645

Same: Evidence: Mortality and annuity tables.

2. Where decedent had contributed to the support of his parents, mortality and annuity tables may be admissible in evidence as an aid in estimating their future damages on account of his death, but the subject is not one for mathematical computation, especially where the parents had no legal right to any contribution. *Hackett v. Wis. Cent. R. Co.* 464

Excessive damages. See NEGLIGENCE, 13.

3. An award of $7,500, confirmed by the trial court, for the death of a brakeman, is *held* not excessive. *Boucher v. Wis. Cent. R. Co.* 160

4. An award of $6,502 for an injury to a trunkmaker twenty-four years old, whose hand was so crushed as to necessitate amputa-

tion of three fingers, is *held* excessive and reduced to $5,000. *Berger v. Abel & Bach Co.* 321

5. Where an adult unmarried son, employed as a locomotive fireman, had voluntarily contributed an amount not exceeding $150 per year to the support of his parents, the younger of whom was fifty-one years old, and who were not dependent upon and had no legal right to such contribution, an award of $4,500 as damages to the parents for his death is *held* excessive, but option is given to remit therefrom all in excess of $2,500. *Hackett v. Wis. Cent. R. Co.* 464

6. An award of $3,500 for the death of a well-educated married woman, thirty-eight years old, who before marriage was capable of earning $60 per month, and since her marriage had, besides performing her household duties, assisted her husband in performing his duties as railroad station agent, was not excessive. *Fisher v. Waupaca E. L. & R. Co.* 515

7. An award of $8,000 as damages for breach of a marriage promise was not excessive under the evidence in this case. *Hanson v. Johnson,* 550

8. The supreme court will encourage the trial judges to exercise their judgment in cutting down excessive verdicts, and so far as possible will sustain the estimate of such a judge where he has reduced an award to the amount which in his judgment is proper. *Ibid.*

Evidence. See BREACH OF MARRIAGE PROMISE, 3–5.

DEATH.

See BANKS AND BANKING, 13, 14. DAMAGES, 2, 3, 5, 6. INSTRUCTIONS TO JURY, 4. INSURANCE, 17, 19. NEGLIGENCE, 7. RAILROADS, 11, 18. SIGNATURES, 2. STREET RAILWAYS, 3, 8, 10.

1. A law giving, under specified circumstances, a right of action for damages to particular surviving relatives of a person when his death has been caused by actionable negligence of another, does not apply to wrongs antedating the law though death resulted therefrom subsequently. *Quinn v. Chicago, M. & St. P. R. Co.* 497

2. Though there may different rights of action for damages arise from the injury and death of a person through actionable negligence of another, each springs from a remedial right, as distinguished from a violation of it, existing at the time of the wrongful act. *Ibid.*

3. The right of action accruing in favor of surviving relatives of a person upon his death being caused by actionable negligence of another, is not one which survives since it does not exist till death occurs. *Ibid.*

4. Though the right of action arising in favor of surviving relatives of a person upon his death being caused by actionable negligence of another comes into existence when death occurs, it has an inchoate existence as soon as the negligent act produces the injury. *Ibid.*

DEBTOR AND CREDITOR. See ATTACHMENT. CORPORATIONS, 1–8, 10–12. FRAUDULENT CONVEYANCES. GARNISHMENT. INSURANCE, 6.

DEEDS.

Requisites and validity. See HOMESTEAD.

Same: Grant to person not in existence.

1. In general, a grant to a person not in existence is void; but where the parties to the transaction knew that the grantee named was dead, the inference is that by the use of that name they meant to designate some existing person or persons, and the court will inquire into the situation, the general design of the parties, and the equities between them, to ascertain who was intended. *City Bank v. Plank,* 653
2. Thus, in this case, by the use of the name of a decedent as grantee in a conveyance of land it was intended to designate the executor of his will and to pass the title to such executor in his capacity as such, charged with such trust as might be found necessary to protect all parties interested in the estate of the decedent; and the deed is given effect accordingly. *Ibid.*

DEFICIENCY. See CORPORATIONS, 11. MORTGAGES, 4.

DELIVERY. See CHATTEL MORTGAGES. INSURANCE, 2–4.

DEMURRER. See ACTION, 1. PLEADING, 2–4.

DEPOSITS. See BANKS AND BANKING, 1–3, 8, 9, 13, 14.

DIRECTING VERDICT. See STREET RAILWAYS, 7.

DISCHARGE. See MASTER AND SERVANT, 1.

DISCONTINUANCE. See APPEAL, 2. STREET RAILWAYS, 7.

DISCRETION. See ABATEMENT AND REVIVAL, 2, 3. ACTION, 3. APPEAL, 8. ATTORNEY AND CLIENT, 4, 5. JUDGMENT, 3, 7. PLEADING, 6. SPECIFIC PERFORMANCE, 1.

DISCRIMINATION. See CONTRACTS, 5–7.

DISMISSAL AND NONSUIT. See ACTION, 2, 3. APPEAL, 2. ARBITRATION AND AWARD, 3, 4. GARNISHMENT, 1. STREET RAILWAYS, 7.

DIVORCE.

1. A judgment in a divorce action awarding a certain sum as and for "permanent alimony and division of property" must be construed as making a final division of the property, not open to change after the term at which it was rendered. *Kistler v. Kistler,* 491
2. Such a judgment becomes the separate property of the wife and is not affected by remarriage of the parties to each other. *Ibid.*
3. A stipulation between the parties to a divorce action, reciting their agreement to separate and providing that the wife should prosecute the action and should accept a certain sum as alimony and should not demand any further sum, was void as being an agreement in aid of divorce. *Ibid.*
4. Payment of the sum mentioned in accordance with such void stipulation did not operate to satisfy the judgment in a prior divorce action between the same parties, in which the wife was awarded a certain sum as a final division of property. *Ibid.*

DOCKET ENTRIES. See CRIMINAL LAW, 2, 3.

DOCUMENTARY EVIDENCE. See NAVIGABLE WATERS, 2, 4.

DOWER. See HUSBAND AND WIFE, 1, 2, 5, 6.

DUE PROCESS OF LAW. See PROCESS, 3.

ELECTION OF REMEDIES. See ATTACHMENT. CORPORATIONS, 7.

EMBEZZLEMENT. See BILLS AND NOTES, 3, 4. PARTNERSHIP.

EMINENT DOMAIN.

Condemnation for city street: Appeal.

1. By confirming, pursuant to sec. 925—166, Stats. (1898), an assessment of damages by reason of the condemnation of land for a street, a city waives the objection that the award is excessive, and is therefore not a "party aggrieved" by such assessment, within the meaning of sec. 925—177, and cannot appeal therefrom. *Grand Rapids v. Bogoger*, 530
2. Upon appeal by the landowner from such an assessment the award cannot be reduced, and acceptance, pending the appeal, of the amount awarded is not a waiver of the right to prosecute the appeal. *Ibid.*

ENTIRE CONTRACTS. See CONTRACTS, 1.

EQUAL PROTECTION OF LAWS. See BANKS AND BANKING, 4–9. CONSTITUTIONAL LAW, 18. RELIGIOUS SOCIETIES, 4.

EQUITY.

Jurisdiction. See CORPORATIONS, 7. TAXATION, 1.

Same: Enjoining enforcement of statute.

1. It is competent for a court of equity to entertain an action commenced by a person, specially interested, against administrative officers to enjoin them from executing a law, upon the ground of its being unconstitutional, when such person would otherwise be irremediably damaged. *Wadhams Oil Co. v. Tracy*, 150
2. The question of equity jurisdiction relates, technically, to power itself, but in the broader sense, when such power should or should not be used. *Ibid.*
3. Courts of equity should, as a rule, decline to exercise jurisdiction, though having it, to enjoin public officers from executing the legislative will as to mere minor features of an enactment, not essential to efficacy of the general and dominant features. *Ibid.*

At law or in equity? See INJUNCTION, 1.

ESCROW. See CHATTEL MORTGAGES.

ESTOPPEL. See APPEAL, 6. CORPORATIONS, 5, 6. MORTGAGES, 8. TAXATION, 1. TOWNS, 2.

EVIDENCE.

Judicial notice.

1. In the absence of proof as to the law of another state, the court cannot take judicial notice that it differs from that of Wisconsin. *Illinois S. Co. v. Warras*, 119

Presumptions. See APPEAL, 7. CORPORATIONS, 4. DEEDS. FALSE REPRESENTATIONS, 1. MASTER AND SERVANT, 23. MUNICIPAL CORPORATIONS, 9. SIGNATURES, 3, 4.

Burden of proof. See INSURANCE, 18. MUNICIPAL CORPORATIONS, 13. NEGLIGENCE, 7, 9. PARTNERSHIP, 2. RAILROADS, 26.

Competency. See BREACH OF MARRIAGE PROMISE, 3-5. INSURANCE, 3. MASTER AND SERVANT, 6, 7, 12. RAILROADS, 15.

2. An intent already formed is a fact and may be testified to like any other fact by the person who formed it. *Sharpe v. Hasey,* 76

Relevancy and materiality.

3. The competency of a motorman at the time of an accident being in question, evidence as to his competency when he first began to work, a few days before, was relevant and material. *Fisher v. Waupaca E. L. & R. Co.* 515

Parol evidence. See CONTRACTS, 12.

Prima facie evidence. See BANKS AND BANKING, 11. SIGNATURES, 1.

Admissions. See ARBITRATION AND AWARD, 4. PARTNERSHIP, 4.

4. A written notice of injury served by plaintiff on defendant under subd. 5, sec. 4222, Stats. (1898), about a month before the action was commenced, was in the nature of an admission deliberately made that the damages did not exceed the sum stated in such notice, and was admissible on the question of the amount of damages, even though the action, in which a larger sum was claimed, was commenced within a year after the injury. *Berger v. Abel & Bach Co.* 321

Documentary evidence. See INSURANCE, 2-5. NAVIGABLE WATERS, 2, 4.

Opinion evidence: Competency. See MASTER AND SERVANT, 8, 9. STREET RAILWAYS, 3.

5. Expert testimony directed to ordinary phenomena easily observable by any one of ordinary intelligence is unnecessary and improper. *Ladwig v. Jefferson Ice Co.* 191

6. The opinion of a witness as to the extent to which certain gearing was worn two years before the time in question should have been excluded in the absence of data upon which to base it, there being no uniformity of progress in such wearing. *Winkler v. Power & M. M. Co.* 244

Same: Effect and weight.

7. The opinions of experts, so far as they clash with common knowledge or ordinary observation of simple implements, should not be given weight or credence. *Ladwig v. Jefferson Ice Co.* 191

Weight and sufficiency. See ARBITRATION AND AWARD, 1. BANKS AND BANKING, 13, 14. BREACH OF MARRIAGE PROMISE, 1. CARRIERS, 2, 3. CONTRACTS, 1. EVIDENCE, 7. HIGHWAYS, 6. INSURANCE, 2, 19. LOGS AND TIMBER, 2. MASTER AND SERVANT, 6, 14, 17. MORTGAGES, 6, 8. PARTNERSHIP, 3. RAILROADS, 2, 3. SALES, 3. SIGNATURES. STREET RAILWAYS, 8, 10.

Same: Contradiction of physical laws.

8. The proposition that testimony as to the manner in which an injury was inflicted is in contradiction of known physical laws and therefore impossible and incredible must be supported by demonstration, not by mere conflict of evidence; and all the necessary data for demonstration must appear affirmatively and not depend upon mere credibility of other witnesses. *Winkler v. Power & M. M. Co.* 244

9. In an action for personal injuries caused by the spilling of molten iron from a crane ladle in defendant's foundry, the evidence is *held* not to furnish data sufficient to demonstrate that the injury could not possibly have happened in the manner testified to on the part of plaintiff; and the question whether it did so happen was one for the jury. *Ibid.*

EXCEPTIONS. See APPEAL, 5.

EXCESSIVE DAMAGES. See DAMAGES, 3–8. NEGLIGENCE, 13.

EXCISE. See INTOXICATING LIQUORS.

EXECUTIONS. See GARNISHMENT. MORTGAGES, 2.

EXECUTIVE POWERS. See CONSTITUTIONAL LAW, 2, 3.

EXECUTORS AND ADMINISTRATORS.

Allowance and payment of claims: Appeal. See JUDGMENT, 8.

1. Where a claim against an estate was allowed in the county court and the time for filing claims had expired and money was in the executor's hands in excess of all claims, the executor was bound to pay such claim, and was not excused from doing so by the fact that, before the time for filing claims had expired, he had paid to legatees all moneys in his hands to an amount in excess of the claims filed, without an order of court but with his co-executor's consent. *Citizens T. Co. v. Scheftels,* 307

2. On appeal to the circuit court from an order of the county court commanding an executor to pay an allowed claim, the claimant procured an order to show cause, based on facts stated in the appellant's answer, why the order should not be affirmed. The order to show cause was required to be served at least twenty-four hours before hearing, but was served five days theretofore. On the return day the executor objected that the action should be placed on the calendar for trial, but this objection was overruled and judgment entered affirming the order of the county court. *Held,* that as this judgment was correct on the merits any technical errors in the summary procedure were not ground of reversal, in view of sec. 2829, Stats. (1898), and sec. 3072*m*, Stats. (Laws of 1909, ch. 192, sec. 1). *Ibid.*

EXEMPTIONS. See MUNICIPAL CORPORATIONS, 2, 6.

EXPERT TESTIMONY. See EVIDENCE, 5–7. MASTER AND SERVANT, 8, 9. STREET RAILWAYS, 3.

FALSE REPRESENTATIONS.

1. Proof that more than a year after plaintiff represented that she was the only person who could teach dermatology other schools of dermatology were advertised, did not show falsity of the representations, there being no presumption that such schools existed at the prior date. *Pierce v. Stolhand,* 286

[2. Whether or not such a representation related to a mere matter of opinion and hence, even if false, did not constitute actionable fraud, not determined.] *Ibid.*

FELLOW-SERVANTS. See MASTER AND SERVANT, 16–20. RAILROADS, 2–26. WITNESSES, 1, 2.

FENDERS. See STREET RAILWAYS, 1–6.

FINDINGS. See APPEAL, 5, 8–10, 18. CONTRACTS, 9. TRIAL, 14–16.

FOOD. See CONSTITUTIONAL LAW, 17.

FORECLOSURE. See MORTGAGES, 2–4. VENDOR AND PURCHASER, 2, 4.

FOREIGN CORPORATIONS. See INSURANCE, 12–16. PROCESS, 1, 2.

FOREIGN LAWS. See EVIDENCE, 1.

FORFEITURES. See VENDOR AND PURCHASER, 2, 5.

FRANCHISES. See APPEAL, 16.

FRAUD. See BILLS AND NOTES, 3, 4. CORPORATIONS, 1–8, 10–12. FALSE REPRESENTATIONS.

FRAUDS, STATUTE OF.

Agreements not to be performed within one year.

1. Under the statute of frauds of Colorado relating to contracts for the leasing for a longer period than one year or for the sale of any lands (substantially the same as sec. 2304, Stats. 1898), several distinct and separate writings may be construed together as containing all the terms of the contract, though only one of them be signed by the party to be charged. Thus, in this case, proposals by plaintiff to assign a lease, the lease itself, and an undertaking by defendant to accept one of such proposals, taken together, are *held* to satisfy all requirements of the statute. *Hummer v. McGee,* 216
2. An oral lease of land for one year, to take effect in the future, is valid. *Baumgarten v. Cohn,* 315
3. Such a lease is not within the terms of sec. 2304, Stats. (1898), the latter section being a part of ch. 105, entitled "Of fraudulent conveyances and contracts *relating to personalty.*" *Ibid.*
4. Even though a lease of land for one year be a chattel real and do not convey any interest in real property, it is nevertheless a contract "relating to real estate," within the meaning of the title to ch. 104, Stats. (1898), which includes said sec. 2304. *Ibid.*

FRAUDULENT CONVEYANCES.

In general, under sec. 2320, Stats. (1898), a transfer of property cannot be impeached for fraud upon subsequent creditors of the transferor unless there was at the time of the occurrence mutual intent to defraud them. *Atlanta & W. B. & C. Asso. v. Smith,* 377

FREEDOM OF WORSHIP. See RELIGIOUS SOCIETIES, 4.

GARNISHMENT.

In aid of execution issued out of justice's court.

1. In a garnishment action in a justice's court in aid of execution, under sec. 3700, Stats. (1898), no loss of jurisdiction results from return of the execution *nulla bona.* The action does not depend upon a levy or seizure by virtue of the execution, but upon the absence of such levy; and the right of the justice to the custody of property delivered to him by the garnishee pursuant to sec. 3723*b* rests upon that statute, not upon the execution. *Kremer v. Arians,* 662

2. A sheriff's return on execution that up to the return day he had been unable to find any property, necessarily negatives the finding of any at any earlier time. *Ibid.*

3. The notice of appeal from a justice's court is sufficient to confer jurisdiction if it contains any fair and intelligible description which will enable the justice from his records, and the respondent from his knowledge of the situation, to identify the judgment from which the appeal is intended, although there are technical inaccuracies and omissions in such description. *Ibid.*

4. Where, in a garnishment action in justice's court, a claimant of property brought into court is made a party and the garnishee discharged pursuant to sec. 3723*b*, Stats. (1898), such claimant becomes the defendant, and the action is properly entitled in a notice of appeal as being by the plaintiff against such defendant. *Ibid.*

GENERAL APPEARANCE. See APPEARANCE.

GENERAL CITY CHARTER. See MUNICIPAL CORPORATIONS, 1-3.

GENERAL REPUTATION. See MASTER AND SERVANT, 18-20.

GUARANTY. See PRINCIPAL AND AGENT, 2, 3. SIGNATURES, 1, 4.

HIGHWAYS.

Establishment: Offer of aid as an inducement.

1. Where a contribution or offer of pecuniary aid in case a highway shall be laid out is of such character or is made under such circumstances as would be likely to swerve the town board from its duties in the matter, it is against public policy and vitiates the action of the board; but no such result follows where the offered aid is so trifling and inconsequential in comparison with the cost of the proposed highway that it cannot reasonably be deemed to have been an inducement to the determination arrived at by the board. *Sharpe v. Hasey,* 76

Same: Taking of land.

2. The provision in sec. 3187*a*, Stats. (1898), relating to proceedings to take land for highways, that a "resolution or order made by any such body, whereby any land shall be taken or affected without an application having been made therefor, shall have no effect and shall not be notice to any subsequent purchaser or incumbrancer unless such resolution or order be recorded," refers to the "final resolution or order . . . giving a full and accurate description of the land affected thereby, and accompanied with a map showing the location thereof," mentioned in the preceding part of the section. Such a proceeding is void, therefore, where the only thing recorded was a resolution of a common council declaring the necessity for the widening of a street. *Roehl v. Milwaukee,* 341

3. The nullity of the proceedings resulting from failure to record the final resolution or order under sec. 3187*a*, Stats. (1898), is not limited to "subsequent purchasers or incumbrancers." *Ibid.*

Same: Determination and signing order.

4. The determination by town supervisors to lay out a highway must be made and the required order must be agreed upon at a legal meeting of the board; but after such proceedings are had it is

not essential that the formal written order be actually signed at a board meeting. *Sharpe v. Hasey,* 76

Injuries from defect: Notice. See AUTOMOBILES.

5. The questions whether a notice of injury, given under sec. 1339, Stats. (1898), which inaccurately described the defect in the highway, was intended to mislead and whether it did actually mislead the defendant, are ordinarily for the jury. *Berndt v. Cudahy,* 457

6. Evidence in this case showing, among other things, that the erroneous description resulted from the failure of plaintiff's attorney to understand his client, with whom he could communicate only through an interpreter, established the fact that there was no intent to mislead; and other evidence was sufficient to sustain a finding by the jury that defendant was not in fact misled. *Ibid.*

HOMESTEAD.

Where a deed conveying a husband's homestead was signed by the wife in order that it might be used as security for his debts, and it was in fact used for that purpose, the requirements of sec. 2203, Stats. (1898), were satisfied, even though the wife did not definitely know the amount to be secured. *White v. Daniell,* 273

HOTELS. See SUNDAY.

HUSBAND AND WIFE.

Marriage settlements.

1. An antenuptial agreement whereby the future wife releases her right of dower and other rights in the estate of the husband upon his death, will be regarded with the most rigid scrutiny and will not be upheld unless free from fraud or imposition. *Deller v. Deller,* 255

2. Assuming that an antenuptial agreement may be held invalid because of the mere insufficiency of the provision made for the intended wife, a contract providing that she should receive $5,000 in lieu of all rights given to a widow cannot be held invalid upon that ground, although the husband's estate amounted to $85,000. *Ibid.*

3. In construing an antenuptial agreement the general rule applies, that the intention of the parties is controlling; but, so far as the contract is ambiguous and the intention doubtful, that construction which is most favorable to the widow should be adopted if consonant with reason and if no violence is thereby done to the language used. *Ibid.*

4. An antenuptial agreement, otherwise valid, which precludes the widow from claiming the allowances provided for by sec. 3935, Stats. (1898), is enforceable. *Ibid.*

5. An antenuptial agreement, stated in the opinion, is *held* to preclude the wife from claiming any allowances under subd. 1, 2, sec. 3935, Stats. (1898). *Ibid.*

6. An antenuptial agreement providing as stated in the opinion is construed as giving the wife at her husband's death, in addition to the specific sum named, the right to a reasonable provision for her support during her natural life. *Ibid.*

Conveyances between husband and wife. See INSURANCE, 9.

IMPEACHMENT. See WITNESSES, 3.

IMPLIED COVENANTS. See CONTRACTS, 13–15. PATENTS, 5, 6.

INDICTMENT AND INFORMATION.

Requisites and sufficiency of accusation.

1. A complaint charging that defendant employed a child under the age of sixteen years in a "beer garden" states an offense under subd. 2, sec. 1728*a*, Stats. (Laws of 1907, ch. 523), forbidding the employment of such a child "in any place where intoxicating liquors are made, given away or sold." *State v. Hall,* 30
2. Failure to charge a statutory offense in the language of the statute does not render the complaint insufficient if no substantial right of the defendant is affected and he is not prejudiced thereby. *Ibid.*

INDORSEMENT. See PRINCIPAL AND AGENT. SIGNATURES, 1.

INFANTS. See CHILD LABOR. INDICTMENT AND INFORMATION, 1. INSTRUCTIONS TO JURY, 5. NEGLIGENCE, 1, 2.

INFRINGEMENT. See PATENTS, 4–6.

INJUNCTION.

Grounds. See CONTRACTS, 15. EQUITY, 1, 3. JUDGMENT, 1, 2. PLEADING, 4. TOWNS, 2.

Inadequate remedy at law.

1. Violation of a contract by which an agent for the sale of plaintiff's patterns agreed not to sell the patterns of any other makers may be restrained by injunction,—the remedy at law not being adequate because of the difficulty or impossibility of measuring the damages. *Butterick P. Co. v. Rose,* 533

Mandatory injunctions.

2. Courts of equity have power to issue mandatory injunctions. *St. Hyacinth Cong. v. Borucki,* 205

Temporary injunctions. See RELIGIOUS SOCIETIES.

3. Sec. 2774, Stats. (1898), relating to temporary injunctions, contemplates their issuance in all cases where a party's rights cannot be effectually vindicated unless the opposing party be restrained from so acting or proceeding in such a way as will clearly tend to defeat the object of the suit. *Ibid.*

Vacating.

4. Under sec. 3061, Stats. (1898), the trial court had power upon denying a motion of defendants to vacate a temporary mandatory injunction, and upon defendants' application for a stay of proceedings pending an appeal, to order that such injunction should continue in force on condition that plaintiff give an undertaking to abide and perform any final judgment that should be rendered in favor of defendants. *Ibid.*

INSOLVENCY. See CORPORATIONS, 4, 10–12.

INSPECTION. See MASTER AND SERVANT, 15.

INSTRUCTIONS TO JURY.

Form, requisites, and sufficiency. See MASTER AND SERVANT, 21-24.

1. It is not the duty of the trial court to select individual items of evidence and embody them in instructions. *Hackett v. Wis. Cent. R. Co.* 464

Requests for instructions. See APPEAL, 15. INSTRUCTIONS TO JURY, 5. NEW TRIAL. SIGNATURES, 4. TRIAL, 12.

2. Requested instructions assuming the existence of a fact in dispute are properly refused. *Bakalars v. Continental C. Co.* 43

Form, requisites, and sufficiency in particular actions: Breach of marriage promise.

3. In an action for breach of promise of marriage, where seduction was pleaded in aggravation of damages, a charge to the jury that the only bearing the evidence as to seduction had in the case was to enhance the damages, if any, from such breach of promise, and that in order to find that plaintiff was seduced by defendant the jury must find from a preponderance of the evidence that she had no intercourse with defendant prior to such promise and that she consented to such intercourse solely by reason of such promise, if they found such a promise was made,—presented the question to the jury in a manner sufficiently favorable to the defendant. *Hanson v. Johnson,* 550

Same: Damages: Death of married man.

4. Instructions expressly informing the jury that in assessing damages for the death of a married man they could not go beyond compensation for the pecuniary injury to the wife, are *held* to have corrected any misconception which might have arisen from a remark, made by the court in reply to a statement by counsel, that "the question is, How much pecuniary loss has the relative suffered—that is, in this case, the wife and children of the deceased suffered—by reason of the death?" *Boucher v. Wis. Cent. R. Co.* 160

Same: Injuries to minor.

5. In an action for injuries to a minor, a charge authorizing the jury to assess damages to compensate him for resulting diminution in his earning capacity was not prejudicially erroneous, in the absence of a request for more specific instructions, even though plaintiff was not entitled to his earnings during minority. *Sharon v. Winnebago F. Mfg. Co.* 185

Same: Evidence, direction to disregard. See APPEAL, 7. BREACH OF MARRIAGE PROMISE, 2.

Same: Master and servant. See MASTER AND SERVANT, 23, 24.

Same: Proximate cause. See APPEAL, 15.

Same: Signatures. See SIGNATURES, 4.

Same: Street railways. See STREET RAILWAYS, 6.

6. In an action for death of a person who, by the sudden turning of a frightened horse, was thrown from a buggy upon a street-car track and was run over by a car, an instruction to the jury, stated in the opinion, was not prejudicially erroneous. *Fisher v. Waupaca E. L. & R. Co.* 515

7. An instruction to the effect that, if the motorman had reason to apprehend from what he saw that the horse was likely to be-

come unmanageable, it was his duty to use his best efforts, making use of all the means at his command and all the methods and appliances upon his car, to stop the car as quickly as could thereby be done, if so doing would be likely or tend to avoid injury to persons or property, was not erroneous, there being evidence that the motorman did not use the reverse lever and that its use was necessary to make an emergency stop. *Ibid.*

Same: Credibility of witnesses.

8. While it is proper to instruct the jury that in weighing the testimony of a party they should consider his interest, this ought to be done in connection with a general instruction that considerations of interest, appearance, manner, and the like apply to the party in common with all other witnesses; and the jury should not be told that the testimony of a party is looked upon with distrust and suspicion. *Novak v. Nordberg Mfg. Co.* 298

9. Where the jury had been expressly charged that they should convict only in case they were convinced beyond a reasonable doubt, a subsequent statement to them that cases are to be decided upon the weight of evidence, not by counting witnesses, and that a single witness may be more satisfying than a half dozen witnesses who contradict him, was not erroneous. *Hack v. State,* 346

10. Where a witness on one side is contradicted by one on the other side as to the pivotal fact on which the case turns, and there is no possibility that the testimony of either can be the result of a mere mistake, it is not prejudicial error to say to the jury that one or the other has committed perjury, and to suggest that a motive should be found for such perjury. BARNES, J., *dissenting,* is of the opinion that in this case (an action for selling liquor to a minor) an additional charge, given after the jury had reported that they were unable to agree, in which, besides telling them that they should consider the motive, if any, of the complaining witness in making a false charge, the trial judge stated that there was nothing in the evidence to show why the witness should say that the defendant sold the liquor to him, rather than some other saloonkeeper, was argumentative and prejudicially erroneous. *Ibid.*

INSURANCE.

General rules.

1. In case of ambiguity the words of an insurance policy are to be construed most favorably to the insured. *Bakalars v. Continental C. Co.* 43

LIFE.

Policy: Several writings constituting contract.

2. In an action upon a life insurance policy, plaintiff having produced a policy in the usual form (delivery of which was admitted) to which was pinned a smaller sheet of paper partly printed and partly written and not signed, the evidence (stated in the opinion) is *held* sufficient to show that both papers were delivered to him simultaneously by defendant in carrying out the negotiations for a policy. *Timlin v. Equitable L. Assur. Soc.* 276

3. Plaintiff's testimony tending to show delivery of both papers him was not incompetent, although the agent was dead w whom he negotiated and in whose handwriting the written pa of the annexed paper were,—the facts testified to not being s as to exclude a delivery other than by such agent. *I*

4. *Held*, that the two papers thus delivered constituted the contr of insurance between the parties. *I*

5. Differences between the two papers in texture, color, or qua have very slight weight in such a case in determining whet the contract is contained in both or in one only. *I*

Same: Construction: Tontine policy.

6. The obligation of the insurance company to the policy-hol under a tontine policy is that of a debtor to a creditor. *Tim v. Equitable L. Assur. Soc.*

Same: Dividend certificate.

7. A dividend certificate, issued by a mutual life insurance comp to the beneficiary named in a policy, stating that she is entit to $12 "in the accumulations" of the company, "subject to rights of the company under its charter, and redeemable at discretion of the board of trustees," lacks certainty. *It wo seem* from its language that the interest of the beneficiary intended to be an undivided interest in the accumulation f in the ratio which $12 bore to the interest of the other pol holders in such fund; but upon the evidence in this act (brought upon such certificate many years after its issuan it cannot be determined whether the company was chargea as trustee or otherwise, with interest or profits or, if so, amount thereof. *Hazelton v. New York L. Ins. Co.*

8. The word "accumulations" in such certificate implies a rolling or the adding of interest or income to the principal, indicat that the certificate is not a mere scrip dividend, to be reba on premium when called for and not to draw interest. *I*

9. The issuance of a dividend certificate to a wife in 1867, by an surance company in which the husband had insured his life her benefit, did not transfer to her the title to the money resented by such certificate, since at that time a married won could not acquire title to a chose in action from her husband transfer from him. *I*

Same: Rights of assignee. See PARTIES, 2.

Same: Breach of contract.

10. A complaint is *held* not to show a rescission of the contract, to state a cause of action for the recovery of its value as damages occasioned by the breach. *Jones v. Supreme Co I. O. F.*

11. The rights of the insured under a life insurance contract are uable property rights, and invasion thereof by a breach of c tract gives him a cause of action for damages. *I*

Foreign companies: Withdrawal from state: Doing business in t state: Penalties.

12. A life insurance company which had surrendered its license attempted to withdraw from the state, maintaining no age and writing no new insurance here, and doing, through co

spondence, only those acts which were necessary to fulfil its obligations under outstanding contracts with policy-holders residing in the state, was doing business in this state so as to be subject to reasonable regulation for the benefit of its resident policy-holders. *Chicago T. & T. Co. v. Bashford*, 120 Wis. 281, distinguished. *State v. Columbian Nat. L. Ins. Co.* 557

13. Such company is not, however, "doing business in this state" within the meaning of sec. 1954, Stats. (Laws of 1907, ch. 597), requiring the filing of the annual statement therein prescribed. The words "doing business" in that section mean doing such business as is usually carried on by corporations regularly licensed to transact business in this state. *Ibid.*

14. The penalty imposed by sec. 1954 for failure to file the annual statement therein prescribed is not applicable to a failure to comply with sec. 1953*n*, Stats. (Laws of 1907, ch. 584). *Ibid.*

[15. Whether secs. 1953*n* and 1955*o*—5, Stats. (Laws of 1907, ch. 584 and ch. 483), are valid, not determined.] *Ibid.*

16. TIMLIN, J., is of the opinion that a foreign corporation which has withdrawn from the state except for the purpose of service of process to enforce its former contracts, cannot be made subject to a penal law of this state for failure to file annual reports. *Ibid.*

ACCIDENT.

17. In order that the death of an insured should have resulted from "voluntary exposure to unnecessary danger or obvious risk of injury," within the meaning of a condition in an accident policy reducing the amount payable in such case, there must have been conscious knowledge of the danger and intentional or wilful exposure to it. *Bakalars v. Continental C. Co.* 43

18. In an action upon such a policy the burden is upon the insurer to prove such voluntary exposure to danger by evidence from which the fact can reasonably be inferred, not merely conjectured or guessed. *Ibid.*

19. Evidence that a locomotive fireman took the usual and shortest route from his home through the railroad yard to his place of employment at the roundhouse, and that his injuries indicated that he had been struck and run over by a passing engine, was insufficient to show either that he knew of the danger from which he suffered or that he wilfully or intentionally exposed himself to it. *Ibid.*

20. In an accident policy providing for a reduction in the amount payable in case the injury is "sustained while the insured is insane, delirious, or under the influence of any intoxicant or narcotic," the phrase "influence of any intoxicant" means such kind and degree of influence as impairs his ability to care for himself and thus increases the probability of injury. It is equivalent to the word "intoxication." *Ibid.*

INTENT. See EVIDENCE, 2.

INTEREST. See INSURANCE, 7, 8.

INTERLOCUTORY JUDGMENT. See CORPORATIONS, 11.

INTERPLEADER. See JUDGMENT, 9.

INTERSTATE COMMERCE. See CONSTITUTIONAL LAW, 20.

INTOXICATING LIQUORS.

See CONSTITUTIONAL LAW, 16. INDICTMENT AND INFORMATION, 1
SUNDAY.

1. The word "liquor" and the associated word "drinks" in a stat regulating or forbidding the sale of intoxicants mean an al holic beverage. *Pennell v. State,*

2. Sec. 1565c, Stats. (1898), forbidding the sale in no-license te tory of "any spirituous, malt, ardent or intoxicating liquors drinks," forbids the sale of fermented malt liquor contain alcohol, whether intoxicating or not. *I*

[3. Whether in sec. 1565, Stats. (Supp. 1906; Laws of 1905, ch. 34 the words "shall be deemed proof" create merely a rebutta presumption or mean conclusive evidence of the fact that liquor was intoxicating, not determined.] *I*

4. A threatened refusal by city officers, pursuant to the result o local option election, to grant to a liquor dealer a license the coming year—the time for issuance of such licenses having arrived,—does not affect any existing private right does not entitle such dealer to maintain an action to set as the election. *Oligny v. New Richmond,*

ISLANDS. See NAVIGABLE WATERS, 2–5.

JOINDER OF CAUSES OF ACTION. See ACTION, 1. LOGS AND TIMBER, PATENTS, 6. RAILROADS, 1.

JUDGMENT.

Interlocutory judgment. See CORPORATIONS, 11.

Of dismissal. See ACTION, 3.

For deficiency. See MORTGAGES, 4.

On cognovit: Injunction against entry.

1. An injunction restraining the entry or enforcement of a ju ment on cognovit should be granted only when necessary the efficient protection of the debtor. *Eller v. Miller,*

2. Such a judgment being subject to be set aside on motion so as it is excessive, or to be vacated to permit the interposit of meritorious defenses or counterclaims, a mere threat to en a judgment for an excessive amount upon a judgment note d not warrant an injunction, in the absence of any showing t the holder of the note is insolvent so that claims of the ma against him cannot be collected. *I*

Opening and vacating. See DIVORCE, 1.

3. Under sec. 2832, Stats. (1898), any defendant, whether he personally served or not, may invoke the discretion of the co or judge to relieve him from a judgment at any time within year after he has received notice thereof, without regard to time when the judgment was rendered. *Kingsley v. Steiger.*

4. Under sec. 2833, Stats. (1898), a defendant belonging to the ticular class therein mentioned may, upon proper showing, mand such relief as a right, within one year after notice of judgment and within three years after its rendition. *I*

5. *Gray v. Gates*, 37 Wis. 614, so far as it conflicts with the construction here given to secs. 2832, 2833, Stats. (1898), or with *Pier v. Millerd*, 63 Wis. 33, is overruled. *Ibid.*

6. A party applying under sec. 2832, Stats. (1898), for relief against a judgment must show mistake, inadvertence, surprise, or excusable neglect. Mere lack of notice, together with a showing of a meritorious defense, is not sufficient. *Ibid.*

7. Where, by reason of the want of a proper showing, it would have been an abuse of discretion to open a judgment under sec. 2832, Stats. (1898), the party applying for such relief was not prejudiced by an order denying his motion, and such order will be affirmed, although not made in the exercise of discretion but upon the ground that the court had no power to grant the application. *Ibid.*

Conclusiveness of adjudication.

8. Disallowance by the county court of a claim against an estate for breach of the covenant against incumbrances in a warranty deed from the decedent to the claimant, on the ground that the deed was a purely voluntary conveyance, involved only the question of the legal liability of the estate on such covenant, and is not a bar to a subsequent action by the grantee to compel the executor and trustee of the decedent to remove the incumbrance in question pursuant to the terms of his trust. *Itzel v. Winn*, 645

9. In an action of interpleader brought by the executor and trustee of a decedent to determine the validity and effect of a warranty deed given by the decedent in her lifetime and the duty of the trustee, in whom the legal title was vested, as to transferring such title to the grantee named in said warranty deed free of incumbrances, a judgment sustaining the validity of the warranty deed as an effective exercise of the power of appointment reserved to the grantor in her prior conveyance to the trustee, and directing the trustee to "deed the property in dispute" to the grantee in said warranty deed, is decisive of a subsequent action between the same parties in which said grantee seeks to compel the executor and trustee to cancel and discharge a mortgage which was specifically in question in the former action. *Ibid.*

10. When a person holding the legal title to land and also a mortgage thereon is commanded by a judgment to "deed" the land to a party who has by his pleading asserted his right to a deed clear of incumbrances, such judgment should be construed as requiring an effective deed conveying the premises free from the lien of such mortgage. *Ibid.*

Construction of judgment. See DIVORCE, 1, 2.

Satisfaction. See DIVORCE, 4.

JUDICIAL DISCRETION. See ATTORNEY AND CLIENT, 4, 5.

JUDICIAL NOTICE. See EVIDENCE, 1.

JUDICIAL POWER. See CONSTITUTIONAL LAW, 2, 3, 7–14.

JUDICIAL SALES. See RECEIVERS.

JURISDICTION. See ARBITRATION AND AWARD, 2. COURTS. EQUITY. GARNISHMENT, 1, 3. INJUNCTION, 4. PATENTS, 4. PROCESS. TAXATION, 1.

JURY.

Misconduct: Harmless impropriety.

A remark by the clerk of the court, to one or more of the jurors as they passed through the court room in charge of an officer after having been out all night, that their beds were all made up for the night, and the reply of one of them that he thought they would be out before night, constituted merely a harmless impropriety. *Sedlack v. State,* 589

JUSTICES' COURTS. See GARNISHMENT, 1, 3, 4.

LAND CONTRACTS. See VENDOR AND PURCHASER.

LANDLORD AND TENANT. See FRAUDS, STATUTE OF. MINES AND MINERALS.

LEGISLATIVE POWER. See CONSTITUTIONAL LAW, 2–7.

LIBERTY OF CONSCIENCE. See RELIGIOUS SOCIETIES, 4.

LICENSES. See INTOXICATING LIQUORS, 4. PATENTS, 1–3.

LIENS. See ATTACHMENT. MECHANICS' LIENS. MORTGAGES, 1, 2.

LIFE INSURANCE. See INSURANCE, 2–16.

LIMITATION OF ACTIONS.

See EVIDENCE, 4. HIGHWAYS, 5.

The defense of the statute of limitations falls when the proper statute is not pleaded. *Hazelton v. New York L. Ins. Co.* 639

LINE OF DUTY. See RAILROADS, 6–9.

LIS PENDENS. See HIGHWAYS, 2, 3.

LOCAL OPTION. See INTOXICATING LIQUORS, 2–4.

LOGS AND TIMBER.

Lien on logs: Enforcement by assignee.

1. Under sec. 3333, Stats. (1898), an assignee of several time checks, though not himself an employee, may enforce all the claims for liens in one action. *Bayfield County Bank v. Duluth Log Co.* 1
2. A finding by a referee, confirmed by the trial court, that certain time checks were purchased, not paid, by the plaintiff bank, is *held* to be sustained by the evidence. *Ibid.*

MACHINERY. See MASTER AND SERVANT, 6–11.

MANDATORY INJUNCTIONS. See INJUNCTION, 2, 4.

MAPS. See NAVIGABLE WATERS, 4.

MARRIAGE SETTLEMENTS. See HUSBAND AND WIFE.

MARRIED WOMEN. See DAMAGES, 6. DIVORCE, 2. HUSBAND AND WIFE. NEGLIGENCE, 11, 12.

MASTER AND SERVANT.

Relation: Termination and discharge.

1. Under a contract by which an employee agrees to perform services to the satisfaction of his employers, they may discharge him if dissatisfied, and it is immaterial whether the reasons

for dissatisfaction exist in fact or in imagination; but the dissatisfaction must be real and in good faith. *Lieberman v. Weil*, 635

Services and compensation.

2. By a contract with a traveling salesman, stated in the opinion, the salesman is *held* entitled to the salary, and the provision as to commissions inoperative so long as they did not exceed the salary. *Lieberman v. Weil*, 635

Master's liability for injuries to servant: Tools, machinery, and appliances. See NEGLIGENCE, 1, 2. TELEGRAPHS AND TELEPHONES.

3. It is not negligence upon the part of the master to lay out a particular mode of doing his work or to furnish particular appliances therefor, where neither such mode nor such appliances are inherently or latently dangerous. *Ladwig v. Jefferson Ice Co.* 191

4. When the servant, knowing of such mode and of such appliances, enters and continues in the service, he assumes the ordinary risks thereof arising from such mode which he knows by ordinary observation, and from such appliances which are simple in their construction and not worn out, broken, or defective. *Ibid.*

5. Thus, the risk of injury through the falling of a bracket and the scaffold supported thereby upon which he was working was assumed by a carpenter who had entered and continued in the service with full knowledge of the mode in which the work was carried on, and had, with his fellow workmen, made, placed in position, and fastened up the brackets (which were simple, easily understood, and not defective), and might have exercised his judgment as to the safety of the mode of hanging them, and might have braced up the bracket in question by such additional contrivances as common sense would suggest, including, if necessary, a scantling from the floor to the outer side thereof. *Ibid.*

6. In an action for personal injuries to an employee caused by the spilling of molten iron from a crane ladle in defendant's foundry, the fact that the ladle was in substantially as safe condition as similar ladles used in such foundries generally is competent and proper to be considered upon the question of whether defendant exercised ordinary care in furnishing such appliance for use by its employees, but is not conclusive upon that question, as the appliance, though in common use, might be inherently, and to the employer obviously, dangerous. *Winkler v. Power & M. M. Co.* 244

7. The master cannot escape liability for injuries caused by his failure to exercise ordinary care to furnish his servants reasonably safe appliances by proving that all other masters in the same line of business and using the same appliances are equally negligent. *Ibid.*

8. In an action for injuries to an employee caused by a machine alleged to have been defective, it having been shown that the machine was liable to make a dangerous motion, like that which caused the injury, if the power was thrown off prematurely, there was no error in permitting plaintiff to attempt to prove by expert testimony that appliances to prevent such motion

could have been attached, and hence that such condition of the machine constituted a defect. *Berger v. Abel & Bach Co.* 321

9. Nor was it error, as against defendant, to strike out such testimony at his request. *Ibid.*

10. An employee whose hand was caught and crushed, while he was performing a proper act in the course of his duty, by reason of a secret danger in the operation of the machine at which he was working, was not guilty of contributory negligence if he neither knew nor, in the exercise of ordinary care, ought to have known of such danger. *Ibid.*

11. The question being whether the employer ought to have known that an employee set to work at a machine was ignorant of a secret danger in the operation thereof, if the facts were insufficient to charge the employee, in the exercise of ordinary care, with knowledge, it seems that the employer, knowing what the facts were, ought to be charged with knowledge of that insufficiency, especially where he also knew that the employee had never worked at such a machine. *Ibid.*

Same: Places to work. See TELEGRAPHS AND TELEPHONES. WITNESSES, 1, 2.

12. Under a complaint alleging that a large block of stone which plaintiff was lettering when it fell over and injured him had been negligently set up on the earthen floor of defendant's shop, evidence as to the condition of the ground where the stone stood was competent. *Halwas v. American G. Co.* 127

13. It was not error in such case to refuse to submit to the jury at defendant's request a question as to whether there were other places in defendant's shop where the ground was reasonably safe and where defendant's employees might have banked the stone,—the duty being upon defendant and not upon plaintiff to furnish a safe place. *Ibid.*

14. The evidence in this case is *held* sufficient to show that the stone by which plaintiff was injured fell because it was not properly and safely put in position, in view of the nature of the ground upon which it stood. *Ibid.*

15. Plaintiff was not charged with the duty of inspecting the ground upon which the stone was placed and, it not being shown conclusively that he knew of the unsafe condition of the ground, and it not appearing that such condition was so obvious as to charge him with knowledge of the danger, he cannot be held as matter of law to have assumed the risk. *Ibid.*

Same: Rules and regulations. See RAILROADS, 8–10, 12–17, 23.

Same: Warning and instructing servant. See MASTER AND SERVANT, 23, 24.

Same: Fellow-servants. See RAILROADS, 2–26. WITNESSES, 1, 2.

16. A crane crew whose special duty it was to place in proper and safe position in defendant's shop the stones which were to be cut and lettered represented the master in providing a reasonably safe place for the cutters and letterers, and hence were not fellow-servants of a letterer who was injured by the falling of a stone upon which he was working, which had been insecurely set up by such crew without his taking any part in the setting thereof, although it appeared that the letterers called upon the

crane crew to place the stones and in some cases, though not as a part of their duty, assisted the crew in that work. *Halwas v. American G. Co.* 127

Same: Incompetence of fellow-servant: Reputation: Notice to master.

17. Sufficient evidence to warrant a jury in finding that a servant was incompetent should be offered before evidence of his reputation for incompetency or carelessness should be received for the purpose of showing that the master was chargeable with knowledge of such incompetency. *Moering v. Falk Co.* 294

18. The reputation which may be shown in such a case is the servant's general reputation among those acquainted with his work, not his reputation among a particular class which includes a part only of those having such acquaintance. *Ibid.*

19. The fact that the servant alleged to be incompetent and other employees of defendant avoided careless acts of the character in question while defendant's foremen were about, might be significant on the question of actual notice to defendant, but cannot render incompetent the evidence as to general reputation. *Ibid.*

20. Evidence tending to show facts calculated to give notice to the master of the habitual carelessness of a servant in the use of gasoline, together with evidence that the servant had a general reputation for such carelessness among those with whom he worked, is sufficient to make it a question for the jury whether, in the exercise of ordinary care, the master should have discovered that the servant was incompetent, and whether the master was negligent in failing to discharge him. *Ibid.*

Same: Contributory negligence. See MASTER AND SERVANT, 10, 11, 25. RAILROADS, 8, 9, 18, 20. TELEGRAPHS AND TELEPHONES.

21. With no experience, as defendant knew, in machinery save in the operation of an electric traveling crane, and without instruction as to his duties or warning as to the dangers, plaintiff was set to assist the operator of a machine for boring steel in defendant's factory. The power for the machine was turned on or off by moving gear wheels on their shafts, but there was no mechanism for doing this other than a raised rim or bead, not particularly noticeable to an inexperienced person, on the hub of the wheel, which the employee was expected to take hold of with his fingers. Upon evidence tending to show that plaintiff was ordered by the operator to pull off the gears and made an attempt to do so; that he told the operator that he did not know how, and was again ordered to throw them off, but was given no instructions; and that in attempting to do so by taking hold of the circumference of one of the wheels his fingers were caught and crushed in the cogs, it is *held* that it was a question for the jury whether defendant was negligent in failing to give proper instruction or warning as to the danger. *Novak v. Nordberg Mfg. Co.* 298

22. The question whether plaintiff was guilty of contributory negligence was also, upon such evidence, for the jury. *Ibid.*

23. The jury were properly instructed in such case that the presumption in case of an adult employee is that he has sufficient intelligence to comprehend the dangers of his employment, but where there is ignorance, inexperience, or lack of intelligence

on the part of the employee, which is or ought to be known the master, and which tends to prevent the employee from cor prehending the dangers, it is the duty of the master to proper instruct and warn the employee thereof. *Ibi*

24. An instruction, requested by defendant, that if plaintiff did n tell the operator that he did not know how to pull off the gea the verdict must be for the defendant, was properly refuse *Ibi*

Same: Assumption of risk. See MASTER AND SERVANT, 4, 5, 1 RAILROADS, 6.

25. Although the question of plaintiff's assumption of the risk shoul properly have been submitted for special verdict separate fro the question of his contributory negligence, a failure so to su mit it cannot be assigned as error by defendant, where he di not present a question properly covering the matter and the ve dict as found did in legal effect cover it. *Winkler v. Power M. M. Co.* 24

26. A question which the court was asked to submit for special ve dict, "Was the spilling of molten iron which caused plaintiff injuries a common occurrence in the business of molding an one incident to plaintiff's work as a bench molder in defendant foundry?" did not properly cover the question of plaintiff's a sumption of the risk, since it did not embrace the questio whether plaintiff knew, or in the exercise of ordinary car ought to have known, of such occurrences. *Ibi*

Liability for injuries to third persons: Acts or omissions of servan

27. For injuries to a third person caused by pieces of a broken glas bottle thrown by a servant as a result of an accidental expl sion, the master is not liable. [Whether the master would b liable if the explosion was not an accident, but an ordinary an usual occurrence which in the exercise of ordinary care h should have anticipated and guarded against, not determined. *Lippert v. Joseph Schlitz B. Co.* 45

MAXIMS.
Res judicata pro veritate accipitur, 649.
Respondeat superior, 456.
Sic utere tuo ut alienum non lædas, 55.
Volenti non fit injuria, 467.

MEASURE OF DAMAGES. See DAMAGES. EVIDENCE, 4.

MECHANICS' LIENS.

Subcontractor's lien.

1. Sec. 3315, Stats. (1898), as to stating, in the subcontractor's no tice, the amount due, is satisfied by such substantial complianc therewith that the person served with notice can readily deter mine therefrom the correct amount. *West Allis L. Co. v. Wie senthal,* 46

2. In an action to enforce a subcontractor's lien, the owner of th building is entitled to the benefit of all deductions from th claim which the principal contractor might rightfully insis upon, including damages for failure to properly perform th subcontract. *Ibid*

3. In an action to enforce a subcontractor's lien, damages for nonfulfilment of the subcontract may be claimed by the owner of the building as an offset, and pleaded as such in the form of a counterclaim. *Ibid.*

4. Where a subcontractor for work for the city of Milwaukee is not an assignee of the principal contractor and has no right to look to the city for his pay, one furnishing materials to such subcontractor is not entitled to a lien under ch. 261, Laws of 1882, upon any sum due from the city to the principal contractor or upon any certificates of indebtedness or city orders issued to such principal contractor. *Milwaukee L. Co. v. Milwaukee;* 632

MEETINGS. See HIGHWAYS, 4.

MINES AND MINERALS.

Leases: Option for assignment: Agreements as to development work.

1. Plaintiff, lessee under a mining lease, made three different proposals to defendant to assign the lease and sell the equipment. Two of these gave defendant an option to purchase the equipment at a future date and provided for payment of a monthly rental until that date. It was afterwards agreed between the parties that defendant would accept one of three proposals and that until such acceptance he would pay the expense of development work by plaintiff, required by the lease. Before the time for acceptance had expired, defendant having failed to keep up the payments for development work, that work was discontinued and the lease forfeited. *Held*, that defendant was not liable for the monthly rental for the equipment, since under the agreement he might have accepted the proposal which did not require payment of rent. *Hummer v. McGee,* 216

2. No purchase having been consummated, and the lease having been forfeited before the time for acceptance expired, defendant was not liable for any purchase money. *Ibid.*

3. Defendant was liable, however, under the agreement for the expense incurred by plaintiff in development work. *Ibid.*

4. Although, before making the proposals to defendant, plaintiff had failed during one month to perform the full amount of development work required by the lease, such failure did not *ipso facto* forfeit the lease or terminate his title, since it might be waived by the lessor; nor did such failure constitute an incumbrance on the leasehold. *Ibid.*

5. A provision in the lease requiring the approval of the lessor to any assignment did not disable plaintiff from contracting to assign it, and defendant, having had the lease in his possession, presumably contracted with reference to such requirement. *Ibid.*

MINORS. See CHILD LABOR. INDICTMENT AND INFORMATION, 1. NEGLIGENCE, 1, 2.

MORTALITY TABLES. See DAMAGES, 2.

MORTGAGES.

Operation and effect of record as constructive notice to purchasers.

1. One who occupies the attitude of a purchaser of a clear title to land from a mortgagor, relying in good faith upon the registry records, and receiving, together with a full warranty deed from

the vendor, a discharge of the mortgage by the record owner thereof, and placing the instruments upon record, will be protected as against an assignee of the mortgage whose assignment had not been recorded. The fact that, at the time of receiving such deed and discharge, the purchaser paid over to the supposed owner of the mortgage the money which was to satisfy it, does not show that he was discharging an obligation from himself to the payee, so as to bring him within the rule that a debtor whose debt is evidenced by a negotiable note, though secured by a recorded mortgage, has no right to rely on the records in paying such debt to other than the real creditor, his authorized agent, or one in actual possession of the note. *City Bank v. Plank*, 653

Foreclosure: Priority of liens.

2. Upon a judgment recovered by one who had attached land of the defendant, execution was issued in the form prescribed by subd. 1, sec. 2969, Stats. (1898), directing satisfaction out of any real property belonging to defendant at the date of the docketing of the judgment, and the sheriff sold and conveyed the interest which defendant had in the attached land at said date. The purchaser paid the full amount of the judgment, and all parties supposed that the procedure was such as to convey the whole interest of defendant at the date of the attachment. Upon foreclosure of a mortgage, the lien of which was subsequent to the attachment and prior to the judgment, it is *held* that the court properly imposed as a condition of the enforcement of the mortgage the recognition and satisfaction of a prior lien in favor of the execution purchaser for the amount paid by him. *Beyer v. Dobeas*, 89

Same: Judgment.

3. A judgment establishing as a mortgage a conveyance of land which is absolute in form, and decreeing foreclosure thereof, need not provide that the mortgagee shall convey back the premises in case of redemption, such reconveyance not being essential to the re-establishment of the mortgagor's legal title, even of record. *Phelan v. Fitzpatrick*, 84 Wis. 240, distinguished. *White v. Daniell*, 273

Same: Deficiency judgment.

4. In a statutory foreclosure action, if the principal cause of action fails there can be no judgment for deficiency. *City Bank v. Plank*, 653

Redemption: Conveyance by mortgagor to mortgagee.

5. In order to support a transfer of mortgaged land by the mortgagor to the mortgagee, terminating the right of redemption, it must be clearly shown that the conveyance or release was voluntary on the part of the mortgagor, was based upon an adequate consideration, was untainted by fraud, and that no advantage was taken of the debtor's necessities to drive a hard bargain. *Young v. Miner*, 501

6. The evidence in this case is *held* insufficient to show that by such a transfer the mortgagors intended to release all equity of redemption, or that the transfer was voluntary on their part. *Ibid.*

7. Such a transfer, by embarrassed mortgagors to the mortgagee, of land worth from $2,000 to $3,000 for no consideration except

the mortgage debt and some trifling additions, aggregating $900, cannot be sustained. *Ibid.*

8. An estoppel as against the mortgagors making such a transfer to the mortgagee, in favor of a third person claiming title under such mortgagee, is not established by evidence which fails to show that the conveyance to such person was based upon a valuable consideration or even that he was ignorant of the mortgagors' rights. *Ibid.*

MUNICIPAL CORPORATIONS.

Adoption of parts of general charter: Repeal of parts of special charter.

1. Where, pursuant to sec. 926, Stats. (1898), a city has adopted sections of the general charter law "in lieu of the provisions of its special charter," the adopted sections do not supersede any part of the special charter not within the same subject matter nor dependent upon the expressly displaced provisions. *Block v. Fond du Lac,* 85

2. Secs. 925—201 to 925—207 of the general charter law having, when adopted by the city of Fond du Lac, superseded the provisions of its special charter which made it the duty of lotowners to keep the sidewalks in repair and made them primarily liable for injuries caused by failure to perform that duty, the further provision imposing upon the city a secondary liability for such defaults of lotowners was also, by necessary implication, superseded; and, the exemption of the city (under sec. 2, subch. 18, of its charter) from liability under the general law being dependent upon and compensatory of the liabilities above mentioned, the abolition of those liabilities abolished that exemption. *Ibid.*

3. Sec. 6*b*, subch. 18, of the charter of Fond du Lac (sec. 4, ch. 435, Laws of 1889), was not repealed by the adoption of secs. 925—201 to 925—207 of the general charter law, relating to the construction and repair of sidewalks. *Ibid.*

Torts: Defects or obstructions in streets: Personal injuries.

4. Evidence that a mud hole nearly two feet deep, extending across the traveled track in a street, with an abrupt ascent at one end of about twenty inches where it joined the hard ground, had existed for years, and that before the accident frequent complaint thereof had been made to the street commissioner, is *held* to sustain a finding by the jury that the city had such notice of this condition that in the exercise of ordinary care it could have remedied the defect before the accident. *Marlow v. Fond du Lac,* 74

5. The question of plaintiff's contributory negligence in driving into a deep mud hole extending across the traveled track in a street is *held*, upon the evidence, to have been for the jury. *Ibid.*

Same: Sidewalks.

6. In the absence of any special exemption from liability for injuries caused by defective walks, and of any liability specially created, the liability of a city in such a case is governed by sec. 1339, Stats. (1898). *Block v. Fond du Lac,* 85

Same: Defects and obstructions in sewers.

7. If a municipality, without first having duly adopted a plan, constructs and puts in operation an unsuitable sewer system, it is liable to a private property owner for damage caused proximately to his property by the insufficiency without contributory negligence of such owner. *Hart v. Neillsville.* 3

8. If a municipality puts a sewer system in operation, having first duly adopted plans therefor, and the same is insufficient because of failure to exercise ordinary care in executing such plans, it is liable for injuries proximately caused to private property, without concurrence of contributory negligence of the owner thereof. *Ibid.*

9. In the circumstances stated in No. 7 and No. 8 the insufficiency being inherent in the plans or original construction, notice to the city from the beginning of the difficulty, sufficient to charge it with liability, is presumed. *Ibid.*

10. If a municipality is free from actionable negligence, respecting adoption of plans for its sewer system and constructing and putting the system in operation, but the system proves not to be reasonably suitable, and it fails reasonably to remedy the deficiency within a reasonable time after having received actual, or constructive, notice thereof, it is liable the same as in case of want of ordinary care inhering in the installation of the system. *Ibid.*

11. If a property owner knows, actually or constructively, of a deficiency in a municipal sewer system rendering it dangerous to connect his property therewith by a drain with an open end in his basement, yet he does so, he is guilty of contributory negligence precluding him from recovering for an injury to such property, proximately caused or aided by such circumstance. *Ibid.*

12. If a person connects the basement of his dwelling house with a main sewer in front thereof, by a drain, leaving the basement end open, and he thereafter perceives that it is dangerous to his property, he cannot recover damages from the municipality for injury thus caused to such property, which ordinary care on his part, after discovering the danger, would have prevented. *Ibid.*

13. If all the conditions exist, rendering a municipality liable to a property owner because of sewage passing from a public main sewer to and into his dwelling-house basement by way of a drain-pipe connection between such main and such basement, unless the inflow is permitted by a defect in the drain for which the property owner is wholly or partially responsible,—the burden of proof is on the defendant to show want of ordinary care of such owner. *Ibid.*

14. In the circumstances stated in No. 13, and it appearing that damage was caused by back flow of sewage from the drain, caused by insufficiency of the sewer system, such sewage reaching the basement through a defect in the drain, as apparently attributable to want of ordinary care of the property owner as attributable to actionable insufficiency of the sewer system, the former cannot recover. *Ibid.*

15. Want of ordinary care in "adopting" a plan for a sewer, found by a special verdict, is construed to mean want of such care in

selecting the plan and in examining and passing upon its sufficiency, or in failing to examine and pass upon its sufficiency, or in constructing a sewer or series of sewers without any definite plan, and not merely in voting upon a resolution of adoption. *Peck v. Baraboo,* 48

16. If a city first collect surface water in a sewer or drain and thereafter, by reason of negligent construction or maintenance of the sewer or drain, allow the water so collected to escape upon adjacent land, it will be liable for the damage caused thereby. *Ibid.*

17. But a city cannot be held in damages by the landowner for changing the natural flow and increasing the volume of surface water on his premises by the construction of streets and gutters, nor because a sewer was inadequate, either by reason of negligence in adopting plans in the first place or by reason of negligent failure to maintain the sewer in good working order thereafter, to carry off the surface water as fast as it accumulated. *Ibid.*

MUTUALITY. See ATTORNEY AND CLIENT, 3. CONTRACTS, 15.

NAVIGABLE WATERS.

1. A grant from the United States of land bounded by a stream, with no reservation or restriction, will be given effect according to the law of the state in which the land lies. *Farris v. Bentley,* 671

2. A patent from the United States, without reservation, of land in this state on a navigable stream not forming the boundary line between states, vests title in the patentee to the center of the stream midway between the banks, regardless of the navigable channel, subject to the rights of the public in the stream; and he also takes title to any unsurveyed island included within such limits. *Ibid.*

3. Such title of the patentee to an unsurveyed island cannot be divested by the United States by a subsequent survey and patent to another, in the absence of a showing that the island was left unsurveyed by fraud or mistake. *Ibid.*

4. The map of the original government survey, showing the outline of an island near the south bank of a river, is not by itself sufficient to show that an island now located in the north half of the river was at that time in the south half. *Ibid.*

5. The description of land in a complaint and judgment in ejectment as "Fraction Number Five in Section two, Township eight North, Range five east" (excepting a certain described parcel), "together with all the riparian rights appurtenant thereto, including all islands opposite the shore thereof and north of the thread of the river," is sufficient, since with the aid of a competent surveyor the lines can be run and the boundaries found. *Ibid.*

6. That part of the bed of a stream to which a riparian owner has title lies between the bank and the thread of the stream, and between lines drawn from the points where his boundaries reach the bank to the thread of the stream, at right angles to the line of such thread. *Ibid.*

NECESSARY PARTIES. See CONTRACTS, 17. PARTIES, 2.

NEGLIGENCE.

Acts and omissions constituting negligence. See AUTOMOBILES. DAMAGES, 3-6. DEATH. HIGHWAYS, 5, 6. MASTER AND SERVANT, 2-27. MUNICIPAL CORPORATIONS, 4-17. RAILROADS, 2-26. STREET RAILWAYS. TELEGRAPHS AND TELEPHONES. TRIAL, 2, 4, 6, 11, 13. WITNESSES, 1, 2.

1. The employment of a boy under the age of sixteen years in operating a circular saw, in violation of sec. 1728*a*, Stats. (Laws of 1907, ch. 523), is negligence as a matter of law. *Sharon v. Winnebago F. Mfg. Co.* 185

2. Where as a result of such employment the boy is injured, the negligence of the employer is the proximate cause of the injury as a matter of law, the statute itself establishing the fact that some injury should reasonably be anticipated as a natural and probable result of its violation. *Ibid.*

3. A finding by the jury in such a case that a defect in the saw was the proximate cause of the injury, is immaterial. *Ibid.*

Same: Condition and use of land, buildings, and other structures.

4. Premises cannot be said to have been unsafe as to a person thereon by invitation, so as to render the owner liable on that ground for an injury to such invitee, if no injury could have befallen the latter merely from the condition of the premises or the ordinary conduct of the business thereon, without the intervention of some responsible negligent human agency. *Lippert v. Joseph Schlitz B. Co.* 453

Proximate cause of injury. See APPEAL, 15. MUNICIPAL CORPORATIONS, 7, 8. NEGLIGENCE, 2, 3. RAILROADS, 3, 19. TRIAL, 2, 5.

5. When physical injury flows directly from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured person, such fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow. *Pankopf v. Hinkley,* 146

[6. Whether, in a complaint alleging that through defendant's negligence plaintiff received "a severe fright and shock" and that a miscarriage resulted therefrom, the word "shock" is used to mean a physical or a mental disturbance, or as meaning a condition partaking of both, not determined.] *Ibid.*

Contributory negligence. See AUTOMOBILES, 1-4. CARRIERS, 3. MASTER AND SERVANT, 10, 11, 22, 25. MUNICIPAL CORPORATIONS, 5, 7, 8, 11-14. NEGLIGENCE, 10. RAILROADS, 3, 4, 8, 9, 18-26. STREET RAILWAYS, 7. TELEGRAPHS AND TELEPHONES. TRIAL, 12.

7. In an action for death caused by negligence, where the burden of proving the contributory negligence of the decedent is upon the defendant, a finding in the special verdict negativing such contributory negligence should not be changed by the trial court unless the fact is established affirmatively by undisputed evidence. *Clary v. Chicago, M. & St. P. R. Co.* 411

8. An injured person cannot be held to have been guilty of contributory negligence unless (1) he acted otherwise than an ordinarily prudent person would ordinarily act under the same or similar circumstances, and (2) his acts or omissions so vary-

ing from the standard of prudence contributed proximately to cause his injury. *Ibid.*

Assumption of risk. See MASTER AND SERVANT, 25, 26. RAILROADS, 6.

Actions: Evidence.

9. In an action for damages upon the ground of an injury having been produced by want of ordinary care on the part of the defendant, it is incumbent on the plaintiff to show, by evidence, with reasonable distinctness, how and why the damages occurred. *Hart v. Neillsville,* 3

10. In the circumstances stated in No. 9, if whether the real cause of the injury was a condition negligently created by plaintiff, without which the injury would not have occurred notwithstanding the negligence of the defendant, or was the latter negligence, rests wholly in conjecture, he cannot recover. *Ibid.*

11. Where, in an action by a married woman for personal injuries, defendant was permitted to show generally that plaintiff's husband had difficulties with persons for whom he sold goods as to his returns on sales, that she had knowledge thereof, and that it caused her trouble and worry, it was not error to exclude further evidence to show specifically a defalcation of the husband and plaintiff's knowledge thereof as accounting for her insomnia, which she attributed to her injuries. *Skow v. Green Bay & W. R. Co.* 21

12. In an action by a married woman for personal injuries, the facts, stated in the opinion, are *held* insufficient to warrant a recovery for loss of prospective profits or individual earnings in her separate business. *Ibid.*

13. The jury in such case having been erroneously allowed to consider evidence on which they might have awarded compensation for prospective loss to plaintiff's separate business and individual earnings, reduction of the damages awarded from $2,500 to $1,500 is deemed sufficient to cure the error. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. PRINCIPAL AND AGENT. SIGNATURES.

NEW TRIAL.

See APPEAL, 18.

Grounds: Rulings and instructions at trial.

In reviewing a decision granting a new trial for error in not charging the jury upon a point as to which an instruction was requested, the request and the decision should be viewed in the light of the evidence, and an established fact may be considered as having been incorporated, by way of qualification, in the requested instruction. *Ripon H. Co. v. Haas,* 65

NOMINAL DAMAGES. See VENDOR AND PURCHASER, 3.

NONSUIT. See STREET RAILWAYS, 7.

NOTICE.

Of appeal. See GARNISHMENT, 3, 4.
Of carelessness of servant. See MASTER AND SERVANT, 20.
Of defect in street. See MUNICIPAL CORPORATIONS, 4.
Of defect in sewer. See MUNICIPAL CORPORATIONS, 9, 10.
Of hearings. See ARBITRATION AND AWARD, 7.
Of injury. See EVIDENCE, 4. HIGHWAYS, 5.
Of subcontractor's lien. See MECHANICS' LIENS, 1.

OFFICERS.

See BANKS AND BANKING, 10–12. CONSTITUTIONAL LAW, 3. EQUITY, 1, 3. RELIGIOUS SOCIETIES, 1.

To constitute an office, as distinguished from a mere employment, the duties must, in general, be shown to be continuous and permanent, not merely transient, occasional, or incidental. *In re Appointment of Revisor,* 592

OFFSET. See MECHANICS' LIENS, 3. PLEADING, 1, 2. SALES, 1, 2.

OPINION EVIDENCE. See EVIDENCE, 5–7. MASTER AND SERVANT, 8, 9. STREET RAILWAYS, 3

OPTIONS. See MINES AND MINERALS, 1.

PARENT AND CHILD. See DAMAGES, 2, 5.

PAROL EVIDENCE. See CONTRACTS, 12.

PARTIES.

See ARBITRATION AND AWARD. CONTRACTS, 16, 17. INSTRUCTIONS TO JURY, 8.

1. A public utility corporation is a "private party," within the meaning of sec. 3466, Stats. (1898). *State ex rel. Green Bay G. & E. Co. v. Minahan Bldg. Co.* 400
2. Where the beneficiary in a life insurance contract is the assignee of all rights accruing to the insured from a breach of contract, she is the real party in interest and the only necessary party plaintiff in an action for damages for such breach. *Jones v. Supreme Court I. O. F.* 667

PARTNERSHIP.

Transfer to partner of interest in "stock, fixtures, and accounts:" Unascertained embezzlement: Accounting.

1. A bill of sale by which one partner transferred to the other all his interest in the "stock, fixtures, and accounts" of a going retail business did not cover the liability, then unknown and unsuspected, of an employee to the firm for property or moneys embezzled, or convey any interest in the amount afterwards collected upon a settlement with such employee, whether that amount be considered as reimbursement, as damages, or as a price of immunity from prosecution. *Hubbard v. Ferry,* 17
2. The vendee in the bill of sale having been the active manager of the business, and having continued it after such sale, and having received the amount collected from the embezzler in adjustment of a liability in part to the firm and in part to himself on account of embezzlements extending through a period both before and after the dissolution, the burden was primarily upon him, in an action for an accounting, to show what part belonged to himself as distinguished from that which belonged to the firm. *Ibid.*
3. An apportionment of the amount collected in such case equally over the whole period of the embezzler's employment, both by the firm and by the partner continuing the business, is *held* to be sustained by the evidence. *Ibid.*

4. Admissions by the embezzler to both parties, prior to the settlement, that the embezzlements had extended over the whole period of his employment, even if not competent evidence of the fact of embezzlements during the term of the partnership, are evidence tending to show that the settlement was made on the basis of embezzlements extending through that time, and that the amount collected belonged in part to the firm. *Ibid.*

PASSENGERS. See CARRIERS.

PATENTS AND PATENT RIGHTS.

Licenses and contracts.

1. The patentee of an article may sell it to whom he pleases or may refuse to sell it at all; he may by contract with purchasers from him fix the retail price at which they may sell the article, and may lawfully stipulate that sales agents appointed by him shall not sell other articles of a like character. *Butterick P. Co. v. Rose,* 533
2. Sec. 1770*g*, Stats. (Laws of 1905, ch. 506, sec. 2), does not apply to contracts relating to the sale of a patented article. *Ibid.*
3. State legislation restricting the rights which a patentee acquires under the constitution and laws of the United States is invalid. *Ibid.*

Infringement.

4. If the same act which is an infringement of a patent is also a breach of a contract with the assignee of the patent or one holding an exclusive license thereunder, such licensee or assignee may ignore his right under the federal statutes to recover for the infringement, and may bring his action in a state court for damages for the breach of contract. *Manning v. Galland-Henning P. M. D. Mfg. Co.* 199
5. A contract granting an exclusive right to make, use, and vend a patented article in specified territory includes an implied agreement that the grantor will not so act as to prevent the grantee from enjoying such exclusive right; and an invasion by the grantor of such territory and of the exclusiveness of the grantee's sale therein is a breach of the contract. *Ibid.*
6. The cause of action to recover damages for the breach of such an implied agreement is strictly one arising out of contract and hence, under sec. 2647, Stats. (1898), may be joined with other causes of action on contract. *Ibid.*

PAYMENT. See BILLS AND NOTES, 1. LOGS AND TIMBER, 2. TAXATION, 2. TOWNS, 2. VENDOR AND PURCHASER, 2–5.

PENAL STATUTES. See STATUTES, 5, 6.

PENALTIES. See INSURANCE, 14.

PERJURY. See INSTRUCTIONS TO JURY, 10.

PERSONAL INJURIES. See CARRIERS. DAMAGES, 2–6. EVIDENCE, 3, 4, 6, 8, 9. HIGHWAYS, 5, 6. INSTRUCTIONS TO JURY, 4–7. MASTER AND SERVANT, 3–27. MUNICIPAL CORPORATIONS, 4–6. NEGLIGENCE, 1–3, 5–13. RAILROADS, 2–26. STREET RAILWAYS.

PLEA IN ABATEMENT. See CRIMINAL LAW, 1.

PLEADING.

Form and allegations in general: Issues tendered. See CONSTITUTIONAL LAW, 19.

Same: Objections to matter of form. See APPEAL, 12.

Complaint. See CONSTITUTIONAL LAW, 19. INSURANCE, 10. QUO WARRANTO.

Defenses in general. See LIMITATION OF ACTIONS.

Plea in abatement. See CRIMINAL LAW, 1.

Answer. See ACTION, 1.

Counterclaim. See MECHANICS' LIENS, 3.

1. Matter of offset must, in any case, be pleaded as a counterclaim. *West Allis L. Co. v. Wiesenthal,* 460
2. If facts pleaded as an offset in the form of a counterclaim do not constitute a cause of action in favor of the party pleading them, the pleading is not demurrable for insufficiency though relief to the extent of a judgment in favor of such party is demanded. *Ibid.*

Demurrer. See ACTION, 1. PLEADING, 2.

3. Although a complaint, as construed by plaintiff himself, does not state a cause of action, a general demurrer thereto should not be sustained if, liberally construed, it states facts from which any liability results. *Loehr v. Dickson,* 332
4. Where a complaint states a cause of action to restrain defendant from advertising and selling the patterns of other makers in violation of a contract with plaintiff, a general demurrer thereto cannot be sustained on the ground that plaintiff is indirectly endeavoring to compel defendant to perform an executory contract calling for personal services in the sale of plaintiff's patterns. *Butterick P. Co. v. Rose,* 533

Amendment.

5. It being alleged in the original complaint that the stone which fell and injured plaintiff was negligently erected "upon the earthen floor" of defendant's shop, and that it sunk the blocks upon which it rested into the earth so unevenly as to throw it out of plumb and cause it to fall, there was no error in allowing an amendment making the complaint read "upon the unsafe and unsuitable earthen floor." *Halwas v. American G. Co.* 127
6. Where a motion to amend the complaint was made after the close of the testimony, denial thereof on the ground that there had been no full presentation of the facts necessary to an intelligent determination of the question sought to be raised by the amendment cannot be held error, where such denial does not appear to have been an abuse of discretion. *Sharpe v. Hasey,* 76

Variance. See INDICTMENT AND INFORMATION, 2.

POLICE POWER. See CONSTITUTIONAL LAW, 15–20.

POSSESSION. See DAMAGES, 1.

POWER OF ATTORNEY. See BILLS AND NOTES, 1, 2.

PRACTICAL CONSTRUCTION. See CONSTITUTIONAL LAW, 1. CONTRACTS, 10, 11.

PRELIMINARY EXAMINATION. See COURTS, 2. CRIMINAL LAW, 1-3.

PRESUMPTIONS. See APPEAL, 7. CORPORATIONS, 4. DEEDS. FALSE PRETENSES, 1. MASTER AND SERVANT, 23. MUNICIPAL CORPORATIONS, 9. SIGNATURES, 3, 4.

PRINCIPAL AND AGENT.

Duties to principal. See BILLS AND NOTES, 2-4. BROKERS. INJUNCTION, 1.

Rights and liabilities as to third persons: Authority to make and indorse notes.

1. Authority to make or indorse promissory notes, given in a power of attorney to "take the general control and management of the" principal's "affairs, business, and property" and to "do every act, matter, or thing which the nature of such business shall require," is limited to such notes only as are necessarily connected with the conduct and management of the business. *First Nat. Bank v. Bean,* 476

2. Where such a power of attorney is duly recorded, and the agent sells to a bank the note of a third person, appearing in no way to be connected with the business, property, or affairs of his principal, on which the principal's name purports to be personally indorsed, and deposits the proceeds of the note in the bank to his personal account, and later, purporting to act under the power of attorney, signs his principal's name to a guaranty of the note, the officers of the bank are not justified in accepting the note or the guaranty as authorized by the power of attorney. *Ibid.*

3. The contract of guaranty in such case, made apparently as an independent undertaking long after the making and negotiation of the note and prior to its maturity, and wholly without consideration as to the principal, is of no effect. *Ibid.*

Same: Ratification.

4. Payments by an agent on a note collateral to a prior note purporting to be indorsed by his principal is not a ratification of such indorsement, where neither the agent nor the principal had any knowledge of the existence of such prior note. *First Nat. Bank v. Bean,* 476

PRINTED CASE. See COSTS.

PRIORITY. See MORTGAGES, 2.

PROCESS.

Service.

1. A statute authorizing an action against a foreign corporation whenever the plaintiff resides in this state and the summons can be served upon some officer or agent of the corporation, is ineffective to confer jurisdiction unless the presence of such officer or agent within the state amounts to presence of the corporation. *Fond du Lac C. & B. Co. v. Henningsen P. Co.* 70

2. Where the treasurer and manager of a foreign corporation was, at the time summons was served upon him, within the state negotiating for adjustment of the corporation's liability upon the

claim sued on, and such matter was within his authority, his presence was the presence of the corporation within the state and jurisdiction was acquired by such service. *Ibid.*

3. Service of summons in the manner authorized by subd. 13, sec. 2637, Stats. (1898), satisfies all requirements of due process of law. *Ibid.*

PROMISSORY NOTES. See BILLS AND NOTES. PRINCIPAL AND AGENT. SIGNATURES, 1, 4.

PROPOSALS. See CONTRACTS, 2. MINES AND MINERALS, 1, 4.

PROTEST. See TAXATION, 2.

PROVISO. See STATUTES, 1.

PROXIMATE CAUSE. See APPEAL, 15. MUNICIPAL CORPORATIONS, 7, 8. NEGLIGENCE, 2, 3, 5, 6. RAILROADS, 3, 19. TRIAL, 2, 5.

PUBLIC OFFICERS. See EQUITY, 1, 3.

PUBLIC POLICY. See HIGHWAYS, 1.

PUBLIC-SERVICE CORPORATIONS. See CONTRACTS, 2, 5–7. PARTIES, 1. RAILROADS, 1. STREET RAILWAYS.

QUO WARRANTO.

Against corporation: Pleading.

1. In an action of *quo warranto*, brought under sec. 3466, Stats. (1898), to oust the defendant from the exercise of a franchise under a pretended city ordinance, a complaint is *held* insufficient because it does not aver that defendant is a corporation, as required by sec. 3205, Stats. (1898), and does not state facts from which the court can find that it is a corporation. *State ex rel. Green Bay G. & E. Co. v. Minahan Bldg. Co.* 400

[2. Whether a statement of facts showing corporate existence, without a direct averment thereof, would be a sufficient compliance with sec. 3205, Stats. (1898), not determined.] *Ibid.*

RAILROAD COMMISSION. See RAILROADS, 1.

RAILROADS.

Railroad commission.

1. The special statutory action provided for in sec. 1797*m*—64, Stats. (Laws of 1907, ch. 499), to vacate an order of the Railroad Commission alleged to be invalid, cannot be joined with another action of primary import against another party to prevent the latter from complying with such order. MARSHALL, J., *dissenting*, is of the opinion that the two causes of action may be joined; that both the Railroad Commission and the public-service corporation to which the order in question is directed are necessary parties to the litigation. BARNES, J., is of the opinion that the Commission is a proper party to the action against such corporation. *Superior v. Douglas County Tel. Co.* 363

Injuries to passengers. See CARRIERS.

Injuries to employees. See DAMAGES, 3, 5.

2. Upon evidence in this case it is *held* that an engineer had reason to anticipate that an injury might result from his management of the engine as stated, and that the question of his negligence

in such management was for the jury. *Boucher v. Wis. Cent. R. Co.* 160

3. Although in such case the brakeman was, as a matter of law, guilty of contributory negligence, yet it not appearing that he deliberately placed himself in a position imminently dangerous to his life, or that he did not get between the drawbars through slight inadvertence, the questions whether the engineer's negligence was the proximate cause of the death and whether the decedent's negligence was slighter or greater than that of the engineer were properly for the jury. *Ibid.*

4. In a question in a special verdict asking whether the negligence of an engineer was "*less* or greater as a contributing cause" of the death of a brakeman than the negligence of the brakeman himself, the word "less" conveyed the same idea as the word "slighter" used in sec. 1816, Stats. (Laws of 1907, ch. 254). *Ibid.*

5. In a question in a special verdict as to discovery of defects in a railway track, the use of the expression "reasonably proper care, test, or inspection" instead of "ordinary care and prudence," or instead of "reasonable and proper care, test, and inspection" (sec. 1816, Stats.: Supp. 1906), was not prejudicial error. *Hackett v. Wis. Cent. R. Co.* 464

Same: Negligence of co-employee: Assumption of risk: Line of duty: Contributory negligence.

6. Under our statutes a railway employee in the line of his duty does not assume the risk of negligence in a co-employee except perhaps in a case where he knowingly, voluntarily, and unnecessarily submits himself thereto. *Hackett v. Wis. Cent. R. Co.* 464

7. A railway fireman riding in an engine as his duty required did not cease to be acting in the line of his duty, within the meaning of our statutes, merely because he performed some negligent act in the course of his conduct. *Ibid.*

8. From the facts that after an engineer and fireman were in their places the engineer increased the speed of the engine to an excessive and dangerous degree, and that the fireman did nothing except to call the engineer's attention to the speed, it cannot be inferred that the fireman co-operated in the negligent act or that he consented thereto at a time when he might have withdrawn himself from the danger; nor can it from those facts be said that the fireman was guilty of negligence, he being subject to the command and control of the engineer. *Ibid.*

9. The fireman in such case was not required to interfere further than he did with the engineer's operation of the engine, by rules addressed to all employees of the railway company, calling attention to their general duty to be careful and to avoid danger and to the duty of one employed with another to caution such other of risks which he is about to encounter. *Ibid.*

10. Such general rules must be deemed controlled, so far as they conflict, by special rules addressed to the firemen, which provided specifically that while on duty the firemen are subject to the directions of their own engineers. *Ibid.*

11. Where the death of a fireman was alleged to have been caused by the negligence of an engineer in running his engine at an ex-

cessive speed, resulting in its derailment, evidence as to the generally weak and defective condition of the track in places in close proximity to the point of derailment, and that heavy engines had recently been run over the road, tending to increase such defects, was admissible on the question of the engineer's negligence. *Ibid.*

Same: Rules and regulations: Yard limits.

12. A rule of a railway company that within yard limits "all trains will move under perfect control . . . so as to make an accident impossible," does not impose upon the company or its employees the absolute duty of making all accidents impossible, but means (in this case at least) that the rate of speed and consequent degree of control shall be such as to prevent an accident having for its cause an excessive speed and consequent lack of control. *Clary v. Chicago, M. & St. P. R. Co.* 411

13. A rule that "transfer men and yard crews working within yard limits must move at a rate to insure safety," must have a similar construction. *Ibid.*

14. The construction of a rule which in clear terms applies to all trains entering and passing through certain yard limits cannot be affected by evidence showing that it was often or commonly disregarded. *Ibid.*

15. A rule that yard crews working within yard limits during weather that obscures the view must move "under flag protection," is ambiguous; and it is competent to show the common interpretation placed thereon by persons acting or purporting to act thereunder, or to show that if the rule required certain things it had been abrogated by common and general disregard thereof. *Ibid.*

16. A yardmaster in charge of railway yards represents the railway company for the purpose of enforcing rules applicable to such yards, acquiescing in the abrogation of such rules, or construing them, when ambiguous, by customary action thereunder. *Ibid.*

17. A rule requiring yard crews in obscure weather to move under flag protection, and a rule requiring all trains entering the yards to move under perfect control so as to make an accident impossible, are complementary and should be construed together. *Ibid.*

Same: Contributory negligence.

18. Whether or not an engineer of a switch engine, who was killed in a collision between his engine and a freight train running through yard limits on a foggy day at a high rate of speed, was guilty of contributory negligence in moving through the yard, under direction of the yardmaster, without having a flagman ahead, was in this case a question of fact for the jury. *Clary v. Chicago, M. & St. P. R. Co.* 411

Same: Comparative negligence. See RAILROADS, 3, 4.

19. In subd. 3, sec. 1816, Stats. (Laws of 1907, ch. 254), in the phrase "negligence *directly* contributing to the injury," the word "directly" is used in the sense of *proximately*, and its use does not operate to change the law on the subject of proximate cause. *Zeratsky v. Chicago, M. & St. P. R. Co.* 423

20. Under sec. 1816, Stats. (Laws of 1907, ch. 254), in an action against a railway company for injuries sustained by an employee, it is for the court to determine whether the evidence tends to show negligence attributable to the company and whether it tends to show contributory negligence of the injured person. If the evidence does so tend, it is for the jury to determine therefrom whether or not there was in fact such negligence or contributory negligence. If it is found that the negligence of both parties concurred to produce the injury, the jury is then to determine whether the negligence of the injured person was slighter or greater as a contributing cause to the injury than that attributable to the company, unless the evidence permits of but one inference, in which case the question is to be decided by the court as a matter of law. *Ibid.*

21. It is not impracticable to have the jury determine whether the negligence of the injured person was slighter or greater as a contributing cause to the injury than the negligence of the company; and the determination of that question need not be based upon the classification of the degrees of negligence into slight, ordinary, and gross. *Ibid.*

22. In reviewing a decision of the trial court to the effect that, as matter of law, plaintiff's negligence was at least equal to that of defendant as a contributing cause to the injury, the permissible inferences from the evidence which are most favorable to plaintiff must be assumed to be the inferences which the jury would have drawn. *Ibid.*

23. Under a rule of a railway company that when a train stops between stations a flagman must immediately go back with proper signals to stop any train that may be following, and another rule that train and engine men will be held equally responsible for a violation of any of the rules governing the safety of trains and must take every precaution for the protection of trains even if not provided for by the rules, it was the duty of the rear brakeman of a freight train which stopped between stations to go back with the required signals, though not directed to do so by the conductor or by signal from the engineer as provided in another rule. *Ibid.*

24. Under the evidence in this case it was a question for the jury whether the negligence of the rear brakeman on a freight train which had stopped between stations, in failing to go back with signals to stop any train which might be following, was slighter or greater, as a contributing cause to his injury in a collision between a train so following and his train, than the negligence of other employees, attributable to the company. *Ibid.*

25. In passing upon such question all the acts of other employees occupying positions of responsibility with respect to the movement of the trains (including in this case the train dispatcher, the engineer of the following train, and the conductor and engineer of the freight train) must be viewed in comparison with the acts of plaintiff, in the light of their respective duties and responsibility. *Ibid.*

26. Sec. 1816, Stats. (Laws of 1907, ch. 254), does not change the rule that in an action by a servant for personal injuries the burden of showing contributory negligence is upon the defendant. *Ibid.*

RATIFICATION. See PRINCIPAL AND AGENT, 4.

REAL PARTY IN INTEREST. See PARTIES, 2.

REAL PROPERTY. See BROKERS. DAMAGES, 1. DEEDS. EMINENT DOMAIN. FRAUDS, STATUTE OF. HIGHWAYS, 1–4. HOMESTEAD. NAVIGABLE WATERS. NEGLIGENCE, 4. SPECIFIC PERFORMANCE. TRIAL, 15. VENDOR AND PURCHASER.

RECEIVERS.

See CORPORATIONS, 11.

Accounting.

An offer to purchase the entire right of a corporation and of its receivers in all the real and personal property described in the inventory, with a single exception not material here, was reported by the receivers to the court, and an order approving their acceptance of the offer followed the same language. The bill of sale or assignment executed by the receivers and confirmed by the court conveyed, among other things, all the right and title of the corporation and of the receivers "in and to each and all of the accounts receivable . . . as of June 17, 1908." *Held*, that the purchaser was entitled to have the proceeds of all accounts, appearing upon the inventory, which had been collected by the receivers after said date and before the sale. *Chicago, R. & M. Line v. Wilmanns*, 289

RECORDS. See MORTGAGES, 1.

RECOUPMENT. See SALES, 1, 2.

REDEMPTION. See MORTGAGES, 3, 5–8

REFEREE. See LOGS AND TIMBER, 2.

RELIGIOUS SOCIETIES.

1. In an action by an incorporated congregation of the Roman Catholic church to compel, by injunction, a former officer thereof, who claimed that he was still such, to turn over to his successor the books and property of the congregation in his possession and to restrain him from acting as such officer, under the facts, stated in the opinion, the court is *held* to have properly issued a temporary injunction in accordance with the prayer. *St. Hyacinth Cong. v. Borucki*, 205

2. The provision in sec. 2001—12, Stats. (1898), that the two laymen selected under sec. 2001—10 as directors of a Roman Catholic congregation "shall be and remain members of such corporation for the term of two years and until their successors . . . are chosen or selected as provided by the by-laws," relates to the two laymen first chosen as directors for the first two years of the corporation. *Ibid.*

3. By-laws providing that the lay directors selected shall be approved by the archbishop; that they may at any time be removed from office by a majority vote of the board of directors; and that the board may fill the vacancies thus created, are within the authority given by secs. 2001—10 to 2001—17, Stats. (1898). *Ibid.*

4. Secs. 2001—10 to 2001—17, Stats. (1898), authorizing the incorporation of congregations of the Roman Catholic church, with provisions for their organization and government different from those applicable to other religious societies, are in accordance with the constitutional guaranties of freedom of worship and liberty of conscience (Const. art. I, sec. 18). They do not grant special corporate powers or privileges in contravention of sec. 31, art. IV, Const.; nor do they deny to any person the equal protection of the laws in violation of the XIVth amendment to the federal constitution. *Ibid.*

REPEAL OF STATUTE. See MUNICIPAL CORPORATIONS, 1–3.

REPUTATION. See MASTER AND SERVANT, 17–20.

REQUESTS FOR INSTRUCTIONS. See APPEAL, 15. INSTRUCTIONS TO JURY, 2. NEW TRIAL. SIGNATURES, 4. TRIAL, 12.

RES ADJUDICATA. See JUDGMENT, 8–10.

RESCISSION. See CONTRACTS, 16, 17. INSURANCE, 10.

RESTRAINT OF TRADE. See CONTRACTS, 11. PATENTS, 1, 2. PLEADING, 4.

RETAINER. See ATTORNEY AND CLIENT, 1.

RETROSPECTIVE LAWS. See DEATH, 1, 2. STATUTES, 3.

REVISOR OF THE STATUTES. See CONSTITUTIONAL LAW, 9, 12.

RIPARIAN RIGHTS. See NAVIGABLE WATERS.

RULES OF COURT.
Supreme Court Rule 6 (Cases and briefs), 22, 29.
Supreme Court Rules 9–12 (Cases and briefs), 48, 56.
Supreme Court Rule 44 (Costs for printing case), 30.

SALARY. See CONSTITUTIONAL LAW, 7. MASTER AND SERVANT, 2.

SALES.

Requisites and validity. See LOGS AND TIMBER, 2. PATENTS, 1–3.

Same: On approval: Qualified acceptance: Breach of warranty.

1. Where plaintiff contracted to install a gas lighting plant in defendant's building and, if it did not satisfactorily light the building, to remove it and to pay any damages caused by the installation, but upon the plant proving unsatisfactory defendant refused to permit its removal unless plaintiff would give security for the repair of the damage, such refusal amounted to an acceptance of the plant, with reservation of the right to recoup damages for its failure to satisfy the warranty. *Leitermann v. Barnard,* 488
2. In an action for the contract price in such case defendant might set off his damages upon proof of the difference between the real value of the lighting plant and its value had it conformed to the warranty, but cannot set off damages to the building, for which he would be entitled to recover only upon removal of the plant. *Ibid.*

Rescission. See CONTRACTS, 16, 17.

Warranties: Breach.

3. The evidence in this case is *held* sufficient to sustain a finding by the jury that the buyer of a horse did not rely upon the seller's representations as to its soundness. *Smith v. Reed,* 483

4. For breach of an express warranty, given in express terms a part of a contract of sale, the vendee may recover without pr ing that he relied thereon; but where a mere representation a fact is proved, it must be shown to have been relied upon the vendee in order to constitute a warranty. *It*

SATISFACTION of judgment. See DIVORCE, 4.

SAVINGS BANKS. See BANKS AND BANKING, 13, 14.

SEDUCTION. See BREACH OF MARRIAGE PROMISE, 1–3. INSTRUCTIONS JURY, 3.

SEQUESTRATION. See CORPORATIONS, 10.

SERVICE OF PROCESS. See PROCESS.

SETTLEMENT. See PARTNERSHIP, 1.

SETOFF. See MECHANICS' LIENS, 3. PLEADING, 1, 2. SALES, 1, 2.

SEWERS. See MUNICIPAL CORPORATIONS, 7–17.

SHERIFFS. See GARNISHMENT, 1, 2.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 2, 3, 6. TOWNS.

SIGNATURES.

1. The rule in sec. 4193, Stats. (1898), that in an action broug upon a promissory note by the indorsee the possession of t note is *prima facie* evidence that it was indorsed by the perso by whom it purports to be indorsed, does not apply to a gu anty indorsed on the note. *Ripon H. Co. v. Haas,*

2. Where, by reason of the death of the person by whom an inst ment purports to be signed, sec. 4192, Stats. (1898), is in plicable, common-law proof of the execution is necessary. *Ib*

3. Where the signature to a contract which is in all respects regul on its face is admitted or proved, the presumption arises th the writing was, when signed, in the form in which it appea at the time of its production in a proceeding to enforce it, a such presumption should prevail until overcome by clear a satisfactory evidence. *Ib*

4. The issue being as to whether a guaranty was indorsed upon note before or after the signature of one of the alleged guara tors was written, and such signature being admitted or prove it was error not to instruct the jury, upon proper request, as the presumption arising from production of the instrument evidence with no indication of any irregularity or alterati appearing thereon. *Ib*

SIMPLE TOOLS. See EVIDENCE, 7. MASTER AND SERVANT, 5.

SPECIAL ASSESSMENTS. See TAXATION, 2.

SPECIAL VERDICT. See APPEAL, 9, 14. MASTER AND SERVANT, 13, 25, 2 MUNICIPAL CORPORATIONS, 15. NEGLIGENCE, 7. RAILROADS, 4, TRIAL, 2–13.

SPECIFIC PERFORMANCE.

See CONTRACTS, 15.

1. An action for specific performance is in a measure addressed the sound discretion of the court, and where there is no abu of discretion the judgment will not be disturbed on appe *Hunholz v. Helz,* 2

2. Upon enforcing specific performance of a contract to exchange lands it was proper to require payment to defendant of the sum by which the taxes paid by him on his land after the making of the contract exceeded the taxes paid by plaintiff on his land. *Ibid.*

3. Where plaintiff was ready, willing, and able to perform on his part an agreement to exchange lands with defendant, and the latter refused to perform, it was proper in decreeing specific performance to award costs to the plaintiff. *Ibid.*

SPIRITUOUS LIQUORS. See INTOXICATING LIQUORS.

STATES.

Fiscal management: Audit: Payment of claims.

1. Disbursements of money from the state treasury must be preceded by an audit by the secretary of state. *Wadhams Oil Co. v. Tracy,* 150

2. A legislative enactment, so far as it authorizes payment of money out of the state treasury without constitutional audit, violates sec. 2, art. VI, Const., making the secretary of state *ex officio* state auditor. *Ibid.*

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Enactment: Alteration before approval.

1. Where, as it passed the legislature, an act contained a proviso in one part of a section, but before approving it the governor changed the position of such proviso, not in any way altering its effect, such change, even if unauthorized, did not invalidate the statute. *Weed v. Bergh,* 569

Penal statutes. See STATUTES, 5, 6.

Constitutionality. See CONSTITUTIONAL LAW.

Amendment and repeal. See MUNICIPAL CORPORATIONS, 1–3.

Construction. See APPEAL, 2, 9, 13. ARBITRATION AND AWARD, 1. AUTOMOBILES, 4. BANKS AND BANKING, 2, 6, 7, 14. CHILD LABOR. CONSTITUTIONAL LAW, 9, 11–14, 16. CONTRACTS, 2. CORPORATIONS, 5, 6, 10. EMINENT DOMAIN, 1. EVIDENCE, 4. EXECUTORS AND ADMINISTRATORS, 2. FRAUDS, STATUTE OF, 1, 3, 4. FRAUDULENT CONVEYANCES. GARNISHMENT, 1, 4. HIGHWAYS, 2, 3, 5. HOMESTEAD. HUSBAND AND WIFE, 4, 5. INJUNCTION, 3, 4. INSURANCE, 13–15. INTOXICATING LIQUORS, 1–3. JUDGMENT, 3–7. LOGS AND TIMBER, 1. MECHANICS' LIENS, 1, 4. MUNICIPAL CORPORATIONS, 1–3, 6. NEGLIGENCE, 1. PARTIES, 1. PATENTS, 2, 6. PROCESS, 1, 3. RAILROADS, 1, 4, 5, 19, 20, 26. RELIGIOUS SOCIETIES, 2–4. SIGNATURES. STREET RAILWAYS, 1, 2, 7. SUNDAY. TRIAL, 14.

2. The evil which a statute is designed to cure may be considered in construing it. *State v. Hall,* 30

3. A statute which is not by its terms retroactive but is ambiguous, is to be strictly construed in favor of nonretroactive character. *Quinn v. Chicago, M. & St. P. R. Co.* 497

4. In construing a statute, effect must be given if possible to every word, clause, and sentence thereof. *State v. Columbian Nat. L. Ins. Co.* 557
5. The rule that a criminal statute should not be so construed as to multiply offenses where such a construction can reasonably be avoided, is equally applicable to statutes imposing pecuniary penalties. *Ibid.*
6. Statutes imposing penalties must be strictly construed, and will not be extended by implication. Doubtful questions thereunder are to be resolved favorably to those from whom the penalties are sought to be recovered. *Ibid.*

Same: Retroactive operation. See DEATH, 1, 2. STATUTES, 3.

STATUTES CITED, ETC.

(See page xxix, following CASES CITED.)

STIPULATIONS. See ATTORNEY AND CLIENT, 2–5. DIVORCE, 3, 4.
STOCK AND STOCKHOLDERS. See CORPORATIONS, 1–8.
STREAMS. See NAVIGABLE WATERS.
STREET LIGHTING. See TOWNS.

STREET RAILWAYS.

Operation: Equipment: Fenders. See APPEAL, 16.
1. The enactment of ch. 390, Laws of 1907 (sec. 1636—58, Stats.), making compulsory the use of fenders on the cars of street and interurban railways, made manifest at once the legislative intent of the necessity for such safety devices, even though the act was not to go into effect until a future date. *Fisher v. Waupaca E. L. & R. Co.* 515
2. In view of the common-law duty of a street railway company so to use the streets as to regard the safety of the traveling public, and of sec. 1862, Stats. (1898), providing that railways must be constructed on the most approved plan, and of provisions in the franchise of the defendant company under which it was bound to use all reasonable care to prevent injury to persons or property, failure to equip its cars with fenders after the enactment of ch. 390, Laws of 1907, may have been negligence on the part of defendant, even though at the time in question said act of 1907 had not yet gone into effect. *Ibid.*
3. In an action for the death of a person run over by a street car which was not equipped with a fender, testimony of an expert that the most approved plan of construction required a fender to pick up objects in front of the car was competent. *Ibid.*
4. It was not error in such a case to exclude evidence that a good-sized dog on a track in another city was not protected by a fender. *Ibid.*
5. Submission to the jury in such case, as a matter of fact to be determined by them, of the question whether defendant's duty to the public required it to equip its cars with fenders, was not error. *Ibid.*
6. An instruction to the effect that the absence of the fender would not render defendant liable unless the jury believed that, if a fender had been provided, it "would have contributed or tended to protect or save [the deceased] from death or injury," was

not erroneous and was in better form than had the quoted portion read "would have in fact saved the deceased from death." *Ibid.*

Injuries to person on the track. See EVIDENCE, 3. INSTRUCTIONS TO JURY, 6, 7.

7. In an action for damages on account of actionable negligence, which is not within the class provided for by sec. 1816, Stats. (Laws of 1907, ch. 254), if the evidence discloses contributory negligence on the part of the plaintiff as a matter of law, a nonsuit should be granted or verdict of no cause of action directed in favor of the defendant, subject to the right of the plaintiff to discontinue upon seasonable application therefor. *Blodgett v. Milwaukee E. R. & L. Co.* 329

8. In an action for death of a person who was thrown from a buggy upon the track and run over by an electric car, the evidence is *held* sufficient to warrant the jury in finding that the motorman was negligent in failing to stop the car before it reached the deceased. *Fisher v. Waupaca E. L. & R. Co.* 515

9. Where, as a rapidly moving street car approached, a horse reared and suddenly turned around, throwing one of the occupants of the vehicle upon the track in front of the car, which passed over her, and the motorman testified that when the horse reared he apprehended danger, it cannot be said that the injury could not have been foreseen. *Ibid.*

10. The evidence in this case was sufficient to warrant the jury in finding that plaintiff's intestate was killed by defendant's car running over her and not by her fall from a buggy to the track. *Ibid.*

STREETS. See MUNICIPAL CORPORATIONS, 4, 5. STREET RAILWAYS. TOWNS.

SUBCONTRACTORS. See CONTRACTS, 18. MECHANICS' LIENS.

SUBSTITUTION OF PARTIES. See CONTRACTS, 16.

SUMMONS. See PROCESS.

SUNDAY.

See CHILD LABOR, 1.

An hotel keeper who uses a single room both for the hotel office and as a place for selling liquor and cigars is not guilty of keeping open his shop on Sunday, under sec. 4595, Stats. (1898), if on that day he wholly discontinues such sales and keeps the room open for use as such office only. *Wieden v. State,* 585

SUPREME COURT. See APPEAL. CONSTITUTIONAL LAW, 9, 11–14. COSTS. DAMAGES, 8. TRIAL, 16.

SURFACE WATERS. See MUNICIPAL CORPORATIONS, 16, 17.

SURVEYS. See NAVIGABLE WATERS, 2–5.

SURVIVORSHIP. See DEATH.

TAXATION.

Levy and assessment. See TOWNS.

Collection and enforcement: Remedies for wrongful enforcement.

1. One taxpayer may maintain an action in behalf of all taxpayers even though, by reason of an estoppel, he has for himself alone no equitable ground of complaint. *McGowan v. Paul,* 388

Same: Payment under protest.

2. Payment of a special assessment under protest, upon refusal of the tax collector to receive other taxes assessed against the same property unless this special tax were also paid, is not a voluntary payment. *Roehl v. Milwaukee,* 341

TAXPAYERS' ACTIONS. See TAXATION, 1. TOWNS, 2.

TELEGRAPHS AND TELEPHONES.

See CONTRACTS, 2, 7.

Maintenance: Injuries to employees.

Where a telephone company had furnished, for use by its employees, a safe appliance for getting to any desired place on cables between poles, but they deliberately chose to use instead an appliance which was dangerous for that purpose, and an injury to one of them resulted from such use, the company is not liable for such injury. *Pierson v. Citizens' T. & T. Co.* 117

TEMPORARY INJUNCTION. See INJUNCTION, 3, 4. RELIGIOUS SOCIETIES, 1.

TENDER. See VENDOR AND PURCHASER, 2–5.

TIMBER. See LOGS AND TIMBER.

TIME CHECKS. See LOGS AND TIMBER.

TONTINE INSURANCE. See INSURANCE, 6.

TORTS.

See DAMAGES, 1. MASTER AND SERVANT, 3–27. NEGLIGENCE. RAILROADS, 2–26. STREET RAILWAYS.

Lawful acts are not transformed into torts by the fact that inconvenience or pecuniary injury results therefrom to another person, or even by the fact that they were done with malicious intent to injure. *Loehr v. Dickson,* 332

TOWN BOARD. See HIGHWAYS, 4.

TOWNS.

Taxation for sidewalks and street lighting.

1. A town has no power to raise money by general taxation to build sidewalks and light public streets in an unincorporated village within its boundaries. *McGowan v. Paul,* 388

2. The expenditure of moneys raised by a tax levy upon property generally in a town for the unauthorized purpose of building sidewalks and lighting streets, pursuant to contracts theretofore made, in an unincorporated village within the town, will be restrained in an action brought by one taxpayer in behalf of all, even though all except the plaintiff have indicated their consent to the levy by voluntarily paying the tax pending the suit. The doctrine of equitable estoppel is inapplicable to such a case because the town had no power whatever to make the contracts or levy the tax complained of. *Babcock v. Fond du Lac,* 58 Wis. 230, distinguished. *Ibid.*

TRANSACTIONS WITH DECEDENTS. See INSURANCE, 3.

TRESPASS. See DAMAGES, 1.

TRIAL.

Course and conduct of trial: Amendment of pleadings. See PLEADING, 6.

Reception of evidence. See APPEAL, 4, 6, 16, 17. ARBITRATION AND AWARD, 1. BREACH OF MARRIAGE PROMISE, 2–5. DAMAGES, 2. MASTER AND SERVANT, 6, 17–20. RAILROADS, 11. SIGNATURES. STREET RAILWAYS, 4.

1. Precedents for the exclusion of evidence must be read, not only with reference to the issues made by the pleadings in the particular case, but also with reference to the other evidence in such case. *Hanson v. Johnson,* 550

Same: Motion to strike out. See MASTER AND SERVANT, 9.

Taking case or question from jury. See EVIDENCE, 9. HIGHWAYS, 5. MASTER AND SERVANT, 21, 22. MUNICIPAL CORPORATIONS, 5. RAILROADS, 3, 4, 18, 20, 24. STREET RAILWAYS, 5.

Same: Dismissal or nonsuit. See ACTION, 2, 3. APPEAL, 2. ARBITRATION AND AWARD, 3, 4. GARNISHMENT, 1. STREET RAILWAYS, 7.

Same: Direction of verdict. See STREET RAILWAYS, 7.

Instructions to jury. See APPEAL, 16, 17. BREACH OF MARRIAGE PROMISE, 2. INSTRUCTIONS TO JURY. MASTER AND SERVANT, 23, 24. SIGNATURES, 4. STREET RAILWAYS, 6.

Same: Requests for instructions. See APPEAL, 15. INSTRUCTIONS TO JURY, 2, 5. NEW TRIAL. TRIAL, 12.

Verdict: General verdict. See APPEAL, 7, 10, 11.

Same: Special verdict. See APPEAL, 9, 14. MASTER AND SERVANT, 13, 25, 26. MUNICIPAL CORPORATIONS, 15. NEGLIGENCE, 7. RAILROADS, 4, 5.

2. A special verdict finding that in each of two separate acts or omissions there was a want of ordinary care on the part of defendant, and further finding, without specific reference to either, that "such want of ordinary care" was the proximate cause of plaintiff's injury, is insufficient if one of such acts or omissions was not actionable. *Peck v. Baraboo,* 48

3. The words of a special verdict should be liberally construed with a view to supporting it. *Ibid.*

4. A special verdict finding that plaintiff was injured by the stone falling upon him; that the ground upon which the stone was placed was not reasonably safe; that the blocks upon which it rested were not of sufficient size to make them reasonably safe, considering the character of the ground; that defendant did not furnish plaintiff with a reasonably safe place to work; that defendant was guilty of want of ordinary care which was the proximate cause of plaintiff's injury; that there was no contributory negligence on the part of plaintiff; and assessing plaintiff's damages,—is sufficient to support a judgment for the plaintiff. *Halvas v. American G. Co.* 127

5. Such a verdict is not insufficient on the ground that it fails to show definitely what negligence the jury found to be the proximate cause of the injury, where no request was made for more specific findings upon that subject. *Ibid.*

6. A question in a special verdict asking whether a party knew, or in the exercise of ordinary care ought to have known, a certain fact, is erroneous in form, but if answered in the negative the duplicity becomes immaterial; and even when the answer is affirmative, if the evidence did not tend to show actual knowledge but merely that the party ought to have known the fact, the jury may be assumed to have considered only the latter part of the question and it may be held that the form of the question did not affect any substantial right. *Berger v. Abel & Bach Co.* 321

7. Where the special verdict as submitted adequately covers the issues, a refusal to submit other questions is not error. *Ibid.*

8. Where the special verdict fully covers all the issues properly for the jury, the refusal to submit other questions was not error. *Berndt v. Cudahy,* 457

9. Refusal to submit certain questions for special verdict is not error where there is no evidence which would sustain findings thereon favorable to the party requesting such submission. *Hackett v. Wis. Cent. R. Co.* 464

10. It is not error to refuse to submit in the special verdict a proposed question relating to a matter which is not within the issues but is a mere evidentiary fact bearing upon a subject covered by a question duly submitted. *Ibid.*

11. Where the court submitted in the special verdict the question whether "a want of ordinary care" on the part of a person contributed to his injury, it was not error to refuse to submit a proposed question as to whether such person's "own *slight* want of ordinary care" so contributed. *Ibid.*

12. Upon the question in a special verdict whether want of ordinary care on the part of a person contributed to his injury, the court properly refused a requested instruction that carelessness and negligence on his part, no matter how slight, if it directly caused or contributed to the accident, would necessitate an affirmative answer. The use of the word "directly," instead of "proximately," was incorrect; and the instruction conveyed the erroneous idea that slight negligence constitutes want of ordinary care. *Ibid.*

13. It is not error to refuse to submit in a special verdict a question as to which there is no evidence which would warrant an answer favorable to the party requesting such submission. *Hanson v. Johnson,* 550

By the court: Findings of fact and conclusions of law. See APPEAL. 5, 8–10, 18. CONTRACTS, 9.

14. Under sec. 2863, Stats. (1898), the trial judge is required to make a finding upon each controverted issue of fact and also to state his specific conclusions of law thereon from which the ultimate judgment results. *Young v. Miner,* 501

15. A finding that at the commencement of the action plaintiffs had no right, title, or interest in the land described in the complaint, is not a finding of fact. *Ibid.*

16. Although, because of the failure to make proper findings, the ground upon which the trial court based its judgment is left to conjecture, yet the supreme court will examine the evidence to

ascertain whether a fair preponderance thereof supports such judgment or would support a judgment the other way, or whether a new trial is necessary to a just determination of the rights of the parties. *Ibid.*

TRUST-FUND DOCTRINE. See CORPORATIONS, 3.

ULTRA VIRES. See CORPORATIONS, 9.

VACATING JUDGMENT. See JUDGMENT, 3–7.

VARIANCE. See INDICTMENT AND INFORMATION, 2.

VENDOR AND PURCHASER OF LAND.

Performance of contract. See SPECIFIC PERFORMANCE.

Payments: Foreclosure.

1. One who by mutual contract confers on another a right or imposes a duty impliedly agrees not to defeat that right or make impossible the performance of that duty by any affirmative acts of his own. *Loehr v. Dickson,* 332
2. Thus, in a land contract under which the purchaser must pay or tender money to the vendor personally at a certain time, the vendor impliedly agrees that he will do no act which will render such payment or tender impossible; and such contractual duty of the vendor continues with reference to a payment or tender which the purchaser must make, in order to prevent a forfeiture of his rights, under the terms of a judgment of strict foreclosure of the contract. *Ibid.*
3. Breach of such contractual duty by wilful evasion of payment or tender gives rise to a right of action for at least nominal damages; and the purchaser may recover such actual damages necessarily resulting from the breach as were reasonably within the contemplation of the parties at the time the respective contract duties were assumed. *Ibid.*
4. Whether payment or tender of the sum named in the strict foreclosure judgment to the vendor's attorney of record, or payment into court, would fix the purchaser's right and prevent the forfeiture, is not determined. Even if payment might be so made, damages might still result from the vendor's breach by reason of the purchaser's inability to get a conveyance of the land at the time of such payment. *Ibid.*
5. The fact that upon breach by the vendor of his duty to receive payment the purchaser might apply to the court for relief against the forfeiture and to have some other method for making payment prescribed, would not prevent damage resulting from the breach, since such application could not be made until the time for payment had expired and would then involve delay and expense. *Ibid.*

[6. Whether profits which would have accrued to the purchaser from a resale negotiated by him, and which were lost by reason of the original vendor's breach of his duty to receive payment and make conveyance, would be recoverable, not determined.] *Ibid.*

VERDICT. See APPEAL, 7, 10, 11.

VICE-PRINCIPAL. See RAILROADS, 16.

VILLAGES. See TOWNS.

VOLUNTARY PAYMENT. See TAXATION, 2. TOWNS, 2.

WAIVER. See ACTION, 1. ARBITRATION AND AWARD, 7. ATTACHMENT. ATTORNEY AND CLIENT, 2. CRIMINAL LAW, 4. EMINENT DOMAIN. MINES AND MINERALS, 4.

WARRANTY. See SALES.

WATERS AND WATERCOURSES. See MUNICIPAL CORPORATIONS, 16, 17. NAVIGABLE WATERS.

WITNESSES.

Competency. See EVIDENCE, 5, 6. INSURANCE, 3.

Same: Transactions with decedents. See INSURANCE, 3.

Cross-examination.

1. In an action for injuries caused by the falling of a large block of stone which plaintiff was lettering, it was not prejudicial error to exclude questions, asked him on cross-examination, as to whether he could think of anything that ought to have been done about the placing of the stone that was not done, whether he knew what was necessary to properly place stones, and whether, from what he noticed at that time as to the placing of stones to be lettered, the one in question needed bracing. *Halwas v. American G. Co.* 127

2. The negligence complained of in such action being the failure to furnish a safe place to work, and the defect not being obvious, defendant was not prejudiced by exclusion of questions, on cross-examination of a witness for plaintiff, as to whether blocks put under stones often shift and have to be replaced, and whether the craneman who placed the stones was not at times called to replace them. *Yezick v. Chicago B. Co.* 138 Wis. 342, distinguished. *Ibid.*

Credibility. See EVIDENCE, 8, 9. INSTRUCTIONS TO JURY, 8–10.

Impeachment.

3. The rule that a party cannot impeach his own witness does not preclude him from showing that the testimony of any witness is incorrect or false in a matter material to the issue. *Halwas v. American G. Co.* 127

WORDS AND PHRASES.

Able. See BROKERS, 4, 5.
Accounts, in bill of sale. See PARTNERSHIP, 1.
Accumulations, in policy. See INSURANCE, 8.
Adopting a plan for a sewer, in special verdict. See MUNICIPAL CORPORATIONS, 15.
Agent, in statute. See CHILD LABOR, 2.
Aggrieved by an assessment, in statute. See EMINENT DOMAIN, 1.
Audit. See CONTRACTS, 8.
Banking business. See BANKS AND BANKING, 1–3.
Deed, in judgment. See JUDGMENT, 10.
Directly contributing to the injury, in statute. See RAILROADS, 19.
Doing business in this state, in statute. See INSURANCE, 12, 13.
Drinks, in statute. See INTOXICATING LIQUORS, 1.
Flag protection, in railway rule. See RAILROADS, 15.
Foreman, in statute. See CHILD LABOR, 2.
General appearance. See APPEARANCE.
Impossible, in railway rule. See RAILROADS, 12.

Influence of any intoxicant, in policy. See INSURANCE, 20.
Insure safety, in railway rule. See RAILROADS, 13.
Label prices, in contract. See CONTRACTS, 13.
Less, in special verdict. See RAILROADS, 4.
Liquor, in statute. See INTOXICATING LIQUORS, 1.
Malt liquors, in statute. See INTOXICATING LIQUORS, 2.
Pecuniarily able. See BROKERS, 4, 5.
Permanent alimony and division of property, in judgment. See DIVORCE, 1.
Private party, in statute. See PARTIES, 1.
Proof, in statute. See INTOXICATING LIQUORS, 3.
Relating to real estate, in statutes. See FRAUDS, STATUTE OF, 4.
Responsible for all moneys, etc., in by-law. See BANKS AND BANKING, 10.
Servant, in statute. See CHILD LABOR, 2.
Shock. See NEGLIGENCE, 6.
Special proceeding, in statute. See ABATEMENT AND REVIVAL, 1.
Vicinity, in contract. See CONTRACTS, 11.
Voluntary exposure to danger. See INSURANCE, 17.
Voluntary payment. See TAXATION, 2.

YARD LIMITS. See RAILROADS, 12–18.

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